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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2304

Revisions to Tariff F.C.C. Nos. 1, 2, and 13

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1990; Released: June 27, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 17, 1990, AT&T Communications (AT&T) filed under Transmittal No. 2304 its annual price cap filing, pursuant to Section 61.43 of the Commission's Rules, 47 C.F.R. § 61.43, to become effective July 1, 1990. There were no petitions against the filing.

2. In support of its filing, AT&T submitted its computations of the revised price cap indexes for each of three service baskets to demonstrate that its proposed rates do not exceed the price caps. The AT&T price cap index computations are based upon the assumption that certain increased costs resulting from a change in AT&T accounting practices are exogenous costs for the purposes of the Commission's Rules describing the computation of price cap indexes. Exogenous cost increases raise price cap levels, permitting AT&T to raise prices, or not to lower them as much as would otherwise be required. AT&T states that its 1990 decision to switch from a cash basis to an accrual basis accounting for post-employment health and welfare benefits creates an exogenous cost increase of $196 million for all its price capped services.[1] AT&T explains that the Financial Accounting Standards Board (FASB) intends to make such accrual accounting mandatory as Generally Accepted Accounting Principles (GAAP), beginning in 1992, and that AT&T can save $33 million per year if it begins accruing this liability 18 months early. The Defense and Justification (D&J) further states that almost all the Regional Bell Operating Companies (RBOCs) have already recently made, or are in the process of making, this change and that the RBOCs have been accorded ratemaking expense recognition for it. Under current GAAP and the Commission's own Uniform System of Accounts (USOA), 47 C.F.R. Part 32, either cash basis or accrual basis accounting is acceptable.

3. The D&J also argues that AT&T will soon be required to implement the change in any event under the USOA, upon adoption of the change by FASB; in this connection, AT&T cites Section 32.16(a) of the Commission's Rules, 47 C.F.R. § 32.16(a), which provides that a carrier's records and accounts shall be adjusted to apply FASB-mandated changes in GAAP, and that Commission approval shall automatically take effect 90 days after the carrier informs the Commission of its intent to change, unless the Commission notifies it to the contrary.[2] AT&T argues both that the ratepayer savings associated with early accrual and that rate of return recognition of similar accounting changes by the local exchange carriers (LECs) warrant treating this cost as exogenous. [3] AT&T cites Section 61.44(c)(5) of the Commission's Rules, 47 C.F.R. § 61.44(c)(5), as a basis for its conclusion that these costs are exogenous. Section 61.44(c)(5) permits exogenous cost treatment of "such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require."

II. DISCUSSION

4. Although the accounting change AT&T seeks to claim as exogenous will probably be mandated by FASB in 1992, and at that time qualify for exogenous treatment, AT&T's decision to implement this change before any change is mandated by FASB or this Commission's accounting rules does not result in a cost change that can be treated as exogenous under the Commission's rules. Section 61.44(c)(2) of the Commission's Rules specifically provides for a mechanism to reflect Commission-mandated changes in the USOA.[4] In the *Price Cap Order*, the Commission stated that Section 61.44(c)(2) exogenous costs can be either cost changes resulting from a change in its accounting rules or in any Commission-approved change in GAAP.[5] Neither the language of the rule, or the language of the *Price Cap Order*, enable AT&T to claim as exogenous a proposed change in GAAP or USOA.

5. AT&T apparently contends that this cost change is an "extraordinary exogenous cost change" for the purposes of Section 61.44(c)(5). That interpretation is incorrect. Cost changes must be both extraordinary and exogenous to qualify as extraordinary exogenous cost changes. The term "exogenous" is consistently used throughout the *Price Cap Order* and the *Further Notice* to describe costs that are not within the carrier's control.[6] Although the cost changes that result from implementation of this accounting change at this time might be viewed as extraordinary for some purposes, the changes were clearly within AT&T's control and accordingly cannot be classified as exogenous for purposes of the Commission's Rules.

6. AT&T has relied exclusively upon an erroneous interpretation of the Commission's rules to justify the price cap levels it submitted. We reject the filing for failure to follow the Commission's requirements for the calculation of price cap indexes.[7] Correction of the indexes is mandatory because erroneously raised price cap levels give AT&T pricing flexibility not intended by the Commission's rules, and affect service bands that govern pricing flexibility at the service category level.[8]

7. The additional disallowances to the LECs' annual 1990 access tariffs from our recently released Annual 1990 Access Tariff Order also require further revisions to AT&T's filing.[9] Once the exogenous cost recognition of post-retirement benefits is removed from the filing and access cost reductions are reflected, AT&T's price cap indexes will be lower than originally filed. Rates AT&T filed for its Residential and Small Business Basket must be reduced to a level equal to or below the cap level, since AT&T has not complied with the requirements for an above-cap filing.[10] Accordingly, we grant AT&T special

permission, pursuant to 47 C.F.R. §§ 61.151-153, to effect revisions to its price cap indexes and its rates no later than June 28, 1990, to be effective July 1, 1990.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to 47 C.F. R. §§ 61.151-153, the above-captioned tariff transmittal of AT&T Communications IS REJECTED.

9. IT IS FURTHER ORDERED that AT&T Communications is directed to file revisions to its cost support information demonstrating the adjustments reflected in this Order, including adjustments to its price cap indexes.

10. IT IS FURTHER ORDERED that AT&T Communications SHALL ISSUE revisions to its tariff in compliance with this Order no later than June 28, 1990, with a scheduled effective date of July 1, 1990. For this purpose we assign Special Permission No. 90-589 and waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Letter from R. Lee, Director-Federal Regulatory, AT&T, to the Secretary, Federal Communications Commission, May 16, 1990.

[2] D&J at 14 & n.**.

[3] *Id.* at 12-15.

[4] 47 C.F.R.§ 61.44(c)(2).

[5] Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3017-18 (para. 295) (1989) (*Price Cap Order*). Under Section 32.16(a) of the Commission's Rules, 47 C.F.R. § 32.16(a), carriers seeking to implement a change in the GAAP must notify the Commission of their intention to change their accounting practices. The carriers may make the accounting change only if the Commission finds the accounting change compatible with regulatory accounting needs.

[6] *See especially* Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rule Making, 3 FCC Rcd 3195, 3383 & n.738 (1988) (*Further Notice*). *See generally Price Cap Order*, 4 FCC Rcd at 3002-21 (paras. 253-304).

[7] AT&T has submitted, for illustrative purposes, alternative calculations of the three price cap indexes. One version includes the accounting change as exogenous, while the other is calculated without the accounting change. For both sets of price cap index values, actual prices are below the applicable cap. As the D&J makes clear, however, it is the calculation that includes the exogenous change that AT&T seeks to use as its going-forward PCI values. D&J at 16.

[8] *See* Section 61.47(e) of the Commission's Rules, 47 C.F.R. § 61.47(e).

[9] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-845, (Com.Car.Bur. released June 21, 1990).

[10] Rates for services in the 800 Basket and the Business Services Basket are currently well below the applicable caps and will not need to be changed as a direct result of lower price caps.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE COMPANY — Transmittal Nos. 1035 and 1059
Revisions to Tariff F.C.C. No. 41

NEW ENGLAND TELEPHONE COMPANY — Transmittal Nos. 1048 and 1071
Revisions to Tariff F.C.C. No. 40

High Capacity Optical Fiber Interface

ORDER

Adopted: June 26, 1990; Released: June 26, 1990

By the Chief, Common Carrier Bureau:

1. In the above captioned transmittals, New York Telephone Company (NYT) and New England Telephone Company (NET) introduce rates and regulations for two high capacity (45 Mbps) optical interface options to their existing DS3 service.[1] These high capacity options would allow a customer to request an optical, rather than an electrical, interface with NYT's or NET's network. Metropolitan Fiber Systems, Inc. (MFS) and Teleport Communications Group (Teleport) filed petitions to suspend and investigate NYT Transmittal 1035 and NET Transmittal 1048. The NYT and NET transmittals are scheduled to become effective June 27, 1990.

2. NYT and NET will offer several levels of high capacity optical interface service –135 Mbps, 405 Mbps, and 560 Mbps, the equivalent of three, nine, and twelve DS3 circuits, in NYT's serving area, and 135 Mbps and 560 Mbps, the equivalent of three and twelve DS3 circuits, in NET's jurisdiction. NYT Tr. 1035, Description and Justification (NYT D&J) Section 2 at 2; NET Tr. 1048, Description and Justification (NET D&J) Section 2 at 2. Customers may take service under either of the following options. Under Option 1, the "Customer Premises Option," NYT and NET provide and terminate fiber on a fiber distribution frame at the customer premises. Under Option 2, the "Fiber Meet Option," the customer's service is interconnected with NYT or NET at either a manhole located outside of the central office or another manhole, pole, or "alternative site" designated by NYT or NET. The customer must provide compatible fiber up to the designated point of interface. Where NYT or NET facilities permit, the customer may avoid a physical manhole splice by providing an additional length of fiber to link the customer to the central office. The customer must then transfer all rights, title, and interest in the additional length of fiber to NYT or NET for one dollar. NYT D&J, Section 1 at 3-4; NET D&J, Section 1 at 3-4. In either situation, the Customer provides the compatible Optical Line Termination Multiplexor (OLTM) on its premises. NYT and NET will also impose a one-quarter mile channel termination mileage element regardless of the interconnection point chosen. NYT D&J, Section 2 at 2-3; NET D&J, Section 2 at 2-3.

3. NYT and NET have derived the recurring and nonrecurring charges from an unbundling of their existing DS3 high capacity 45 Mbps rates. To reflect the fact that the customer will provide the OLTM at its premises, NYT and NET have reduced the fixed component of the Channel Termination charge by 50 percent. The nonrecurring charge for installation is the same as for existing high capacity DS3 service. In addition, NYT and NET offer a time discount schedule for customers willing to make multi-year service commitments. *Id.*

4. MFS argues that NYT's cost support is inadequate. It believes a more detailed filing is necessary even though NYT claims that the optical interface rates are merely derivations of existing DS3 rates. MFS Petition, NYT Tr. 1035 at 5-6. MFS also maintains that NYT's rates cannot be cost based because they transfer currently tariffed averaged DS3 rates to a LATA-specific service[2] and because they are substantially lower than NYT's state optical interface rates, which are purportedly set at cost-based levels. *Id.* at 6-8. Finally, MFS contends that it is unreasonably discriminatory for NYT to limit its optical interconnection offering to three, nine, and twelve DS3s. *Id.* at 9-10. [3]

5. Teleport argues that the instant tariff revisions are unreasonable because they act to preempt competition without allowing collocation or its equivalent. Teleport Petition at 10-11. Moreover, it maintains that there is no justification for the wide disparity between NYT's intrastate and interstate optical interconnection rates given that the physical connections authorized are identical. *Id.* at 16. Teleport also challenges NYT's and NET's right to limit a customer's choice of customer premises equipment. *Id.* at 16-19. Finally, Teleport objects to NET's failure to offer 405 Mbps optical capacity. *Id.* at 19-22.

6. NYT and NET counter that their rates are adequately supported because they are based on the recurring investments and nonrecurring costs for high capacity 45 Mbps Service described and supported in the 1989 annual access filing. NYT and NET Reply at 5. NYT maintains that the disparity between its intrastate and interstate rates is attributable to the differences between state and federal rate procedures. NYT and NET also argue that it is appropriate for the customer to pay the one-quarter mile channel termination mileage charge even if the customer provides the fiber because the charge covers the cost of placing the fiber, use of the NYNEX telephone company duct space, and maintenance of the facility from the point of interface into the central office. They also argue that the limitations in the tariffs on capacity and equipment are not unreasonable since they are based on the technology available in their respective networks. *Id.* at 6-7.

7. The Common Carrier Bureau has reviewed NYT Transmittals 1035 and 1059 and NET Transmittals 1048 and 1071 and the related petitions. We conclude that no compelling argument has been presented that the tariffs are patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 1035 and

New England Telephone Company Tariff F.C.C. No. 40, Transmittal No. 1048 filed by Metropolitan Fiber Systems, Inc. and Teleport Communications Group ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] On June 22, 1990, NYT and NET modified their optical interface revisions in Transmittal Nos. 1059 and 1071, respectively. These transmittals made changes to the structure of NYT's and NET's tariff. In addition, Transmittal 1059 removed a geographic limitation in NYT's tariff which restricted the provision of NYT's optical fiber interface service to the New York metropolitan LATA.

[2] *See* note 1 *supra*.

[3] MFS repeats these arguments its petition against NET Transmittal 1048. In addition, MFS complains that it is unreasonable for NET to limit its optical interconnection offering to three and twelve DS3s. *See* MFS Petition, NET Tr. 1048 at 7-8.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 27, 1990

Advisory Committee on Advanced Television Service
Implementation Subcommittee Meeting

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

July 17, 1990
10:30 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-327

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 2185

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan 4 - -
CBS, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1990; Released: June 25, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 28, 1990, AT&T filed Transmittal No. 2185 to introduce its fourth Competitive Pricing Plan (CPP4) under AT&T Tariff F.C.C. No. 15.[1] Transmittal 2185 is scheduled to become effective June 26, 1990. AT&T claims that CPP4 responds to a special off-tariff discount offered to CBS, Inc. (CBS) by MCI Telecommunications Corporation (MCI). MCI and US Sprint Communications Company Limited Partnership (US Sprint) filed petitions to reject AT&T's transmittal. The Competitive Telecommunications Association (CompTel) filed a petition to reject or suspend and investigate. For the reasons set forth below, we suspend Transmittal 2185 for the full five-month statutory period.

II. BACKGROUND

2. The Commission has previously considered the lawfulness of an AT&T Tariff 15 offering of Competitive Pricing Plans. In 1988, AT&T filed its first competitive pricing plan for the Holiday Corporation.[2] AT&T had developed the Holiday Rate Plan (HRP) in response to MCI's offer of discounted service to the Holiday Corporation. The Commission initiated an investigation to determine whether HRP was unjustly and unreasonably discriminatory in violation of Section 202(a) of the Communications Act, and whether HRP was justified under the competitive necessity doctrine. [3] In the HRP Final Order, the Commisson found that, even assuming that the competitive necessity defense can justify a single customer offering, that defense could not justify retention of the HRP discount.[4] The Commission concluded that HRP was unreasonably discriminatory and ordered AT&T to file corrective tariff revisions.

3. In 1989, AT&T filed its second Competitive Pricing Plan (CPP2) for Resort Condominiums International (RCI) in response to MCI's offer of discounted service to RCI.[5] On January 19, 1990, the Common Carrier Bureau suspended CPP2 for the full five-month statutory period and initiated an investigation to determine, *inter alia*, whether CPP2 violates the Communications Act prohibition against unreasonable discrimination.[6]

4. The instant transmittal represents AT&T's attempt to establish a single customer offering in Tariff 15 for CBS. CBS currently has approximately 35 locations, which include wholly-owned television and radio broadcast stations, sales offices, and other business offices, located throughout the United States. Collectively, these CBS locations generate approximately 1.8 million minutes of outbound domestic interstate, international, and calling card traffic per month. To meet its telecommunications requirements, CBS uses a variety of outbound interexchange services from AT&T, MCI, and US Sprint. AT&T Description and Justification (D&J), Appendix A at 1-2. In November 1989, CBS solicited competitive proposals for its outbound service needs. AT&T states that it and MCI responded with proposals based on each carrier's tariffed virtual private network service. AT&T claims US Sprint responded with Sprint's VPN tariff but with off-tariff rates. In February 1990, each carrier submitted revised proposals to CBS. AT&T contends that MCI's revised proposal, although based on its tariffed Vnet service contained off-tariff rates and other inducements, and that US Sprint enhanced its previous off-tariff offer. AT&T D&J at 6-7.

5. According to AT&T, CBS expressly stated that it would accept MCI's proposal unless AT&T offered a substantially more competitive rate. AT&T claims that it developed the CPP4 rates in response to this statement. According to AT&T, CPP4 offers CBS, and other customers with a substantially similar offer from MCI, a 23 percent discount off the total monthly billed usage charges for Software Defined Network (SDN) Service Expanded Volume Plan Part V (EVP Part V) and all SDN international calls. AT&T states that the CPP4 discount is in addition to any volume discounts that would otherwise be applicable under its standard SDN tariff. *Id.* at 4-5. CPP4 also contains a three-year term commitment and a minimum usage commitment of 10 million minutes per year for any two years of the three-year period. Transmittal 2185, at Section 6.1.

6. AT&T contends that its response to MCI's customer-specific offer is justified under the doctrine of "competitive necessity." AT&T states that in order to establish competitive necessity, it must show that: (1) an equal or lower priced competitive alternative -- *i.e.*, a similar offering or set of offerings from other carriers -- is available to the customer of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet that competitive alternative without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users. AT&T D&J at 8.[7] Based upon its own calculations, AT&T asserts that the rates in MCI's offer to CBS are below MCI's standard tariffed rates, AT&T's most economical standard tariffed rates, and AT&T's proposed CPP4 rates. Thus, AT&T concludes, CBS has been offered an alternative to AT&T's services at an equal or lower rate and has satisfied the first element of the competitive necessity test. *Id.* at 9. With regard to the second element, AT&T maintains that CPP4 is narrowly tailored to meet competition without undue discrimination because it is available to any customer which can demonstrate that it has received a substantially similar offer from MCI. Finally, AT&T argues that by

enabling AT&T to preserve usage and revenues that would otherwise be lost to competition, CPP4 will benefit all customers through improved earnings which can be used to cover common costs. *Id.* at 10-11.

III. PLEADINGS

A. Petitions

7. CompTel urges the Commission to stop AT&T's "parade of patently unlawful Tariff 15 options." It asserts that parties to the Tariff 15 proceedings have demonstrated that Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a), unequivocally preclude a dominant carrier from offering single-customer rates. CompTel Petition at 1-2. CompTel argues that the Commission previously rejected the competitive necessity defense on the ground that AT&T's Tariff 15 options have been less available than the offers to which they have responded. Furthermore, it concludes that CPP4 cannot satisfy the competitive necessity test because CPP4, as a conditionally available offering, will never be available to the same base of customers as MCI's offer. *Id.* at 3. As a final matter, CompTel maintains AT&T has failed to provide the cost support materials required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. It states that AT&T has ignored the Commission's unambiguous directive in the price cap Order that the net revenue test is not to be used for Tariff 15 filings. *Id.* at 5.

8. MCI argues that the Commission should reject CPP4. MCI believes CPP4 represents a direct and substantial threat to the Commission's pro- competitive policies in the interexchange telecommunications transmission market. MCI Petition at 1. MCI argues that CPP4 is unlawful for all of the reasons which have been presented in the course of other Tariff 15 proceedings. It therefore incorporates by reference the arguments presented in its pleadings on HRP, CPP2, and CPP3, an offering for the First Commerce Corporation. *Id.* at 2-3.

9. US Sprint asserts that CPP4 suffers from the same critical deficiencies as AT&T's predecessor Tariff 15 filings. It claims that neither applicable case law nor the Commission's competitive necessity test sanctions the discrimination inherent in single-customer offerings and, in any event, CPP4 fails to satisfy the three-part showing required under that test. US Sprint Petition at 3-4. US Sprint argues that an AT&T offer that meets but does not beat competitive offers is not probative of reasonableness because of AT&T's substantial market dominance. It also claims that CPP4 is unduly restrictive because CPP4 is available only to customers with an offer from a competing interexchange carrier.

10. US Sprint also attacks AT&T's reliance on the net revenue test to satisfy the Commission's cost support requirements. *Id.* at 4-6, 10-11. Finally, US Sprint maintains that CPP4 represents an attempt by AT&T to circumvent price cap regulation of its SDN, international, and calling card services. It believes that if AT&T is allowed to pull certain offerings to favored customers outside the sphere of price cap regulation, AT&T will try to recover all of that service's common and fixed costs from those customers subscribing to the service at capped rates, while the selected large business customers will take the identical services at discounted rates under Tariff 15. *Id.* at 7-10.

B. AT&T Reply

11. AT&T claims that the petitioners have failed to refute any of the facts supporting its showing that CPP4 is justified under the doctrine of competitive necessity. It accuses MCI and US Sprint of using the Commission's regulatory processes to eliminate a competitor, AT&T, from the market. According to AT&T, following the filing of CPP4, both MCI and US Sprint contacted CBS and made their already off-tariff offers more attractive. AT&T says CBS decided to accept MCI's proposal after comparing the revised offers with CPP4. AT&T argues that its failure to win the CBS bid demonstrates that Tariff 15 filings are not the "lethal tool[s] to preempt competition that petitioners allege, but rather [are] part of a competitive process that drives prices closer to cost and benefits consumers." AT&T claims that CPP4 still qualifies as a competitive response offering because MCI may have made its CBS offer available to other customers. AT&T Reply at 2-3. AT&T states that petitioners' remaining arguments consist almost entirely of reiterations of arguments asserted against previous Tariff 15 filings. It nevertheless addresses each argument in its reply. *See Id.* at 4-8.

IV. DISCUSSION

12. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the Communications Act prohibition against unreasonable discrimination. Yet, as the Commission observed at the time it initiated its investigation of the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[8] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

13. We also conclude that the issues raised by this transmittal warrant exercise of our discretion to suspend the transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of new service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs the negative impact upon AT&T. Moreover, in light of CBS's decision to accept MCI's offer, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

14. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications, Inc., in Tariff F.C.C. No. 15, Transmittal No. 2185.

16. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by AT&T Communications, Inc. ARE SUSPENDED until November 26, 1990.

17. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE a supplement reflecting this suspension no later than June 29, 1990. Special Permission No. 90-592 is assigned for this purpose.

17. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2185 filed by MCI Telecommunications Corporation and US Sprint Communications Company Limited Partnership ARE DENIED.

18. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2185 filed by Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

19. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T maintains that its Competitive Pricing Plans offer telecommunications service to a specific customer at rates established to respond to a competitor's offer.

[2] AT&T's first Competitive Pricing Plan, the Holiday Rate plan, was! introduced in tariff revisions filed May 9, 1988, under Transmittal No. 1215.

[3] *See* AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712 (1988).

[4] AT&T Communications, CC Docket No. 88-871, Memorandum Opinion and Order, 4 FCC Rcd 7933, 7934 (1989) (*HRP Final Order), recon. denied*, 5 FCC Rcd 1821 (1990).

[5] CPP2 was introduced in tariff revisions filed October 23, 1989, under Transmittal No. 1854. On November 6, 1989, AT&T filed amendments to CPP2 under Transmittal No. 1883.

[6] AT&T Communications, Inc., CC Docket No. 90-11, Memorandum Opinion and Order, 5 FCC Rcd 2171 (Com.Car.Bur. 1990). Transmittal 1854 became effective June 21, 1990, but is still subject to investigation.

[7] *See also* Private Line Rate Structure and Volume Discount Practices, Memorandum Opinion and Order, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984) (*Volume Discount Order).*

[8] *HRP Investigation Order,* 4 FCC Rcd at 7713.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-294

In re Applications of

COMMUNITY ENTERTAINMENT, INC. (hereafter "Community")	File No. BPH-880803MG
SCRANTON COMMUNICATIONS, INC. (hereafter "Scranton")	File No. BPH-880804MM
KENNETH J. MOORE (hereafter "Moore")	File No. BPH-880804MO

For Construction Permit for a
New FM Station on Channel 275A
in Scranton, South Carolina

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* A preliminary examination of these applications revealed that the entire allocation for Channel 275A at Scranton, South Carolina is short-spaced to the pending Rule Making in MM Docket No. 87-434, RM-6021. In the *Notice of Proposed Rule Making* in MM Docket No. 87-434, 2 FCC Rcd 6331 (1987), the Commission, at the request of Jones, Eastern of the Grand Strand, Inc. ("Jones, Eastern"), proposed the substitution of Channel 276C2 for Channel 276A at Surfside Beach, South Carolina, and the modification of its license for station WYAK(FM). In response to the notice, Broadcasting of Scranton ("Broadcasting") and Scranton Communications ("Scranton"), filed a counterproposal requesting the allotment of Channel 275A to Scranton, South Carolina, as the community's first local FM service.[1] In the *Report and Order* in MM Docket No. 87-434, 3 FCC Rcd 2798 (1988), the Commission granted Broadcasting's and Scranton's counterproposals. Jones, Eastern then filed a petition for reconsideration, which, in addition to reiterating Jones, Eastern's original proposal, also requested substitution of Channel 286A for 275A in Scranton and substitution of Channel 300A for unused-but-applied-for Channel 286A in Johnsonville, South Carolina. The petition for reconsideration was denied by the Commission in the *Memorandum Opinion and Order* in MM Docket No. 87-434, 4 FCC Rcd 2366 (1989). This Memorandum Opinion and Order also specified that Jones, Eastern's request for rule making proposing the identical channel changes as sought therein would be the subject of a separate Notice of Proposed Rule Making (RM-6448).[2] Accordingly, while the applicants for the Scranton, South Carolina allocation will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the final disposition the counterproposals in MM Docket Nos. 89-326 and 89-327.

3. Information before the Commission indicates that Community was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Community's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Community in this proceeding.

4. *Financial.* The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT	DEFICIENCY
Moore	Applicant certifies that he is not financially qualified but will file certification as amendment to the application.

5. Ruth S. Smith, sole principal of community is an employee (she does not state in what capacity) of Sparten Broadcasting, licensee of station WBTW(TV), in Florence, South Carolina. Florence and Scranton appear to be close enought that her ownership of the instant applicant and the employment at WBTN(TV) could violate the Commission's cross-interest policy. However, Smith has indicated her intent to terminate her relationship with WBTW(TV)

in the event of grant of the referenced application. Accordingly, in the event of grant of Community's application, Ms. Smith will be required to sever all connections with station WBTW(TV) prior to the commencement of program test authority.

6. The officers, directors and shareholders of Scranton are also officers, directors and shareholders of Atlantic Broadcasting Co., Inc. ("Atlantic"). Atlantic is the licensee of station WJMX(FM) in Cheraw, South Carolina. Florence and Scranton appear to be close enough that ownership interests in both the instant proposal and WJMX(FM) will violate the Commission's duopoly rule, 47 C.F.R. § 73.3555(a)(2). The officers, directors and shareholders of Scranton have indicated their intent to terminate their relationships with station WJMX(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Scranton's application, they will be required to sever all connections with station WJMX(FM) prior to the commencement of program test authority.

7. Moore is Assistant Program Director of station WHLZ(FM) in Manning, South Carolina. Manning and Scranton are close enough that the position at WHLZ(FM) and the ownership of the instant applicant could violate the Commission's cross-interest policy. Moore has indicated his intent to terminate his relationship with station WHLZ(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of his application, he will be required to sever all connections with station WHLZ(FM) prior to the commencement of program test authority.

8. Scranton petitioned for leave to amend its application after the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

9. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Scranton has not completed Item 4 correctly. Scranton's application gives a post office box number as the residence address for principals George C. Avent and John A. Jeffords. Accordingly, Scranton must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Community.

2. To determine whether Community's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Community possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine with respect to Moore, whether the applicant is financially qualified.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, any construction permit awarded as a result of this proceeding shall be contingent on the final dispostion of the action taken on the counterproposals in MM Docket Nos. 89-326 and 89-327.

14. IT IS FURTHER ORDERED, That, in the event of grant of Community's application, Ruth S. Smith will be ordered to divest herself of all interests in and sever all connections with Station WBTW(TV) in Florence, South Carolina prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That, in the event of grant of Scranton's application, its officers, directors and shareholder will be ordered to divest themselves of all interests in and sever all connections with Stations WJMX(FM) in Cheraw, South Carolina prior to the commencement of program test authority.

16. IT IS FURTHER ORDERED, That, in the event of grant of Moore's application, he will be ordered to divest himself of all interests in and sever all connections with Stations WHLZ(FM) in Manning, South Carolina prior to the commencement of program test authority.

17. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Scranton IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That Scranton shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the filing of the counterproposal was given on December 28, 1987, Report No. 1702.

[2] Public Notice of the filing of RM-6448 was given on March 14, 1990, Report No. 1809. This Notice specified that this petition for rule making, along with RM-5138, RM-6315, RM-6836, RM-6840, RM-7304, RM-7305, RM-7306, RM-7307 and RM-7308, will be treated as counterproposals to rule making proceedings in MM Docket No. 89-326, 4 FCC Rcd 5989 (1989) and MM Docket No. 89-327, 4 FCC Rcd 5987 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-275

In re Applications of

OLIVE BRANCH BROADCASTING COMPANY	File No. BPH-880816MU
JEFFREY C. FLOYD	File No. BPH-880816NI
MRS. J. J. KIRK d/b/a OLIVE BRANCH BROADCASTING	File No. BPH-880816OE
OLIVE BRANCH COMMUNICATIONS, INC. ("hereafter OBCI ")	File No. BPH-880816OP
GAZELLE BROADCASTING CO., INC.	File No. BPH-880817MA
LOUIS M. ANZEK	File No. BPH-880817MB
FOSTER'S COMMUNICATIONS, INC. ("hereafter Foster ")	File No. BPH-880817MD
HERMINE A. SEGAL ("hereafter Segal ")	File No. BPH-880817ME
CEDARVIEW LIMITED PARTNERSHIP (hereafter " Cedarview ")	File No. BPH-880817MF
COHN BROADCASTING COMPANY	File No. BPH-880817MG

For Construction Permit
for a New FM Station on Channel 239A
in Olive Branch, Mississippi

HEARING DESIGNATION ORDER

Adopted: May 10, 1990; Released: June 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although OBCI and Foster have filed such statements, they are deficient. OBCI and Foster have not listed a women's organization. Accordingly, OBCI and Foster will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Segal and Cedarview petitioned for leave to amend their applications on November 27, 1989 and January 22, 1990, respectively; these amendments were filed after December 19, 1988, the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. OBCI petitioned for leave to amend its application on June 13, 1989 and September 13, 1989. Cedarview petitioned for leave to amend its application on January 17, 1989. The accompanying amendments were filed after December 19, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. In its determination of hazard to air navigation (Aeronautical Study No. 88-ASO-1905-OE) the Federal Aviation Administration determined that OBCI's proposed structure would cause substantial adverse affects upon air navigation. In, addition, no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Anzek would constitute a hazard to air navigation. Accordingly, an issue with respect to OBCI and Anzek will be included and the F.A.A. made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Information before the Commission indicates that OBCI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question OBCI's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against OBCI in this proceeding.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by OBCI and Anzek would constitute a hazard to air navigation.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of OBCI.

3. To determine whether OBCI' organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 2 and 3, above, whether OBCI possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, OBCI and Foster shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by OBCI, Cedarview and Segal ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-575

In re Application of

SUSAN E. TURGETTO File No. BPH-850711MP

For Construction Permit for
New FM Station, Channel 269A,
Sutter Creek, CA

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1990; Released: June 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN issuing a Separate Statement.

1. By *Memorandum Opinion and Order*, FCC 90M-581, released March 21, 1990, Administrative Law Judge Joseph P. Gonzalez (ALJ) granted the application of Susan E. Turgetto (Turgetto), the sole remaining applicant here, and terminated this proceeding. Some 29 days later (on April 19, 1990), Gold Country Communications, Inc. (GCC), while admitting that it has no standing as a party in this proceeding, filed a Motion to Accept Late-Filed Notice of Appeal, and a document styled "Appeal, Notice of Appeal and Request to Reopen the Record." The Commission's Mass Media Bureau (Bureau) and Turgetto, on April 30, and May 1, 1990, respectively, both opposed GCC's Motion, which the Board will deny for the reasons set out below.

2. Section 1.302(b) of the Commission's Rules, 47 CFR 1.302(b), provides that "Any *party* who desires to preserve the right to appeal" a presiding officer's ruling terminating a proceeding "shall file a notice of appeal within *10 days* after the ruling is released" (Emphasis added). GCC concedes that it is not a party to the proceeding, and that its notice of appeal is late. *Motion* at 1-2. Nevertheless, relying on *Shirley Marchant*, 4 FCC Rcd 5241 (Rev. Bd. 1989), GCC argues that its late-filed appeal should be accepted because its accompanying engineering statement identifies a "serious engineering deficiency" (see *Separate Statement* below), "an apparent misrepresentation," and "the type of public interest questions that must be resolved by the Commission and its engineering staff prior to a final grant of the Turgetto application." Motion at 2. The Bureau responds that GCC's motion, which is unsupported by any relevant authority, "should be summarily dismissed because it was not a party to the proceeding and, thus, it has no standing under Section 1.302 to file an appeal." Bureau Opposition pp. 1-2.

3. We agree with the Bureau's response because *Marchant* does not support GCC's position. There, the Bureau, whose standing was not disputed, filed "within two days" of its receipt pertinent information which "raised substantial and material questions of fact concerning a basic qualification aspect of Marchant's application." 4 FCC Rcd at 5242. However, *Marchant* simply does not support Gold Country's notion that a non-party can file a late appeal, pursuant to 47 CFR §1.302(b), which rule requires both standing and timeliness. Nonetheless, as in *Marchant*, the Bureau may, of course, review the information which has been submitted and take whatever action is necessary, if any, to vindicate the paramount public interest. *See KQED, Inc.*, 3 FCC Rcd 2821, 2831 (Rev. Bd. 1988), citing *Metrovision, Inc.*, 2 FCC Rcd 1907 (1987), *recon. denied*, 3 FCC Rcd 598 (1988), and *Separate Statement*, below.

4. ACCORDINGLY, IT IS ORDERED, That the motion to accept late-filed notice of appeal filed April 19, 1990, by Gold Country Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

Nearly five years ago, Susan E. Turgetto filed her application for a new Class A FM facility to serve Sutter Creek, California. During this five-year span, Gold Country Communications, Inc., licensee of KNGT (FM), Jackson, California, an admitted non-party to this proceeding and a "competitor of any new licensee serving . . . Sutter Creek," remained silent. Now, however, with this proceeding finally resolved, GCC attempts to raise, for the first time, alleged "engineering deficiencies" with respect to Turgetto's application.

In the "Engineering Statement" attached to its Appeal, GCC purports to demonstrate that operation of Turgetto's facility from her proposed site would result in substantial "terrain shielding" over the community of license because of two intervening mountain peaks "rising up at approximately 5.5 and 6.0 miles" from Turgetto's transmitter site. While neither Turgetto nor the Bureau directly address the merits of these alleged engineering problems, it is submitted that Turgetto (and the Bureau) should explore the potential "terrain shielding" problems prior to commencement of construction, and Turgetto should amend to a new transmitter site, *if necessary*, to achieve appropriate coverage of the proposed community of license. The Commission's Rules and the public interest demand no less -- and Turgetto would be foolhardy to attempt to operate a facility which listeners in Sutter Creek would have difficulty in receiving.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC.	File No. BPH-870612MC
HERBERT REGENSTREIF	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD.	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC.	File No. BPH-870615MV

For Construction Permit for New
FM Station, Channel 300A,
Midway, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1990; Released: June 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN issuing Separate Statement.

1. The Review Board has before it a Petition to Accept Late-Filed Notice of Appearance, and accompanying Notice of Appearance, filed May 1, 1990 by Midway Communications, Ltd., as well as a pleading styled "Exceptions" (actually a Section 1.302 Appeal, 47 CFR §1.302), which bears a stamp affixed by the FCC Mail Section, dated February 19, 1990. [1]

2. Midway's appeal pertains to rulings by Administrative Law Judge Edward J. Kuhlmann (ALJ), dismissing Midway's application for failure to file a notice of appearance, and disapproving Midway's right to payment pursuant to a universal settlement. *See Memorandum Opinion and Order*, FCC 90M-103, released January 18, 1990, approving remainder of settlement agreements and terminating the proceeding. However, we believe that this situation is controlled by *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988), and, because the settlement agreement is not before us, we remand this matter to the ALJ for action consistent with the Commission's mandate in *St. Croix*.

3. ACCORDINGLY, IT IS ORDERED, That the appeal (*i.e.*, "Exceptions") of Midway Communications, Ltd., dated February 19, 1990 IS GRANTED to the extent indicated above; that its application IS REINSTATED for the limited purpose of participating in the settlement in this proceeding; and that the proceeding IS REMANDED to the ALJ for further action consistent with this opinion; and,

4. IT IS FURTHER ORDERED, That the Petition to Accept Late-Filed Notice of Appearance, filed May 1, 1990 by Midway Communications Ltd. IS GRANTED, and the Notice of Appearance IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] The appeal contains a certificate of service, but apparently was not served on the other applicants, nor did the Board receive its copy through the Commission's normal distribution process. Instead, it was mailed to the Board after Midway's counsel became aware during a status check that the only pending pleading before the Board was Midway's Notice of Appeal. Counsel was therefore advised to refile with the FCC Secretary's Office a copy of all pleadings purportedly earlier filed. A copy of the appeal itself, however, was not refiled. We have waited until the pleading cycle has run before issuing the instant ruling. No responsive pleadings were filed.

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

Many of the problems here, which have resulted in a significant and unnecessary delay in the resolution of this proceeding, have been apparently engendered solely by the delicts of Midway's counsel. The Commission expects that applicants (and, obviously, their counsel) to be familiar with, and conform to, its Rules and Regulations. *See Classic Vision, Inc.*, 1 FCC Rcd 1109, 1110 n. 2 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 2376 (1987); *Silver Beehive Telephone Co.*, 34 FCC 2d 738 (1977).

The public interest in the rapid institution of new FM service to Midway, Kentucky is of paramount importance; thus, I concur with the result herein. However, counsel is monished that in his continuing representation of other applicants before the Commission, he should carefully reassess his practices and procedures lest a less salutory and benign result befall another client.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZI

For Construction Permit for a New FM Broadcast Station on Channel 221A at Fenwick Island, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1990; Released: June 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it a Petition for Reconsideration of its *Memorandum Opinion and Order*, 5 FCC Rcd 1986 (Rev. Bd. 1990) (approving a universal settlement of the above-captioned comparative case), filed by Linda Tarr-Whelan and Allen Zack (Petitioners). [1] The Board also has before it the Opposition pleadings of the Commission's Mass Media Bureau, as well as a Reply of petitioners.

2. Petitioners assert that the subject settlement agreement violates the Communications Act of 1934, as amended, the Commission's Rules, and the public interest, in that it provides the potential for a non-applicant party to succeed precipitately to the Construction Permit. Petitioners appear to concede that the settlement agreement approved here does not differ materially, in form or substance, from an agreement approved in *Evergreen Broadcasting Co.*, 4 FCC Rcd 8224 (1989), even going so far as to acknowledge, insofar as the subject settlement, that "the issues are largely governed" by *Evergreen*. [2]

3. Because we agree that the subject settlement, and our action thereon, was and remains controlled by *Evergreen*, [3] we must reject petitioner's legal and policy arguments.

4. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed on April 25, 1990 by Linda Tarr-Whelan and Allen Zack IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] As explained in our subsequent *Order*, FCC 90R-26, released April 20, 1990, these same petitioners had attempted to intervene in the settlement aspects of this case by pleading of March 26, 1990. Because the Board had, on March 14, 1990, adopted the aforcited *Memorandum Opinion and Order* approving the settlement and terminating the proceeding (upon which that *MO & O* was dispatched to our Dept. of Commerce printers, but not released until April 2, 1990), we dismissed that initial invervention request as moot. Petitioners suggest that, inasmuch as their March 26 intervention petition preceded the April 2 release of our *MO & O* approving settlement, they have standing to request reconsideration.

Without determining whether petitioners had standing then (or now), or have suffered cognizable injury by our action on a settlement between the original applicants, *cf. Rebecca Radio of Marco*, 5 FCC Rcd 937, 938 n.3 (1990), *recon. denied*, FCC 90-177, released May 10, 1990, we shall treat petitioners solely as *amici* for purposes of this instant action, in light of the overlapping of dates between their March 26 petition and the April 2 release of our MO&O.

[2] Petition at 1-2 n.1.

[3] Petitioners urge that *Evergreen* is a "non-final" decision of the Commission's (former) General Counsel, and is the subject of an application for review filed with the full Commission pursuant to 47 U.S.C. § 155(c)(4). However, the General Counsel's action in *Evergreen* was taken pursuant to authority delegated by the full Commission, 47 CFR § 0.251(f)(11), and any such:

> order, decision, report or action . . ., unless reviewed [by the Commission] as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders . . . of the Commission.

47 U.S.C. § 155(c)(3); *Committee To Save WEAM v. FCC*, 808 F.2d 113 (D.C. Cir. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

CARTA CORPORATION	File No. BPH-861230MA
FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
John Marshall Hooker d/b/a JMH BROADCASTING	File No. BPH-861230ME
JOHN EDWARD OSTLUND	File No. BPH-861231MD
VALLEY RADIO LTD., A California Limited Partnership	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for
New FM Station, Channel 257A,
Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1990; Released: June 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 7973 (1989) (*I. D.*), of Administrative Law Judge Chachkin (ALJ), the exceptions of each of the captioned applicants, and the reply briefs. We heard oral argument on March 23, 1990, and have now completed our independent review of the pleadings and the hearing record below.

2. The *I. D.* awarded the Construction Permit at contest to Fresno FM Limited Partnership ("Fresno") under the standard comparative issue, *see id.*, para. 133. The *I. D.* further determined that the runner-up would be Carta Corporation ("Carta"), *see id.*, para. 132. However, significant problems attend the applications of both of these two top finishers; and as much as we are loathe to remand a case already heard and decided, with exceptions filed, we find we are here compelled to remand for a limited supplemental hearing.[1]

3. First of all, and for the reasons set forth more fully below, we agree with all of the exceptors that the ALJ erred fatally in crediting Fresno's comparative proposal, [2] for it is a model sham limited partnership which should have been effectively eliminated from the comparative running, at a bare minimum. Second, on March 22, 1990, the runner-up, Carta, advised the Board and the parties of the death of its sole stockholder, John Sonder, and it seeks to substitute his widow, Dr. Sylvia Sonder, as his successor, thus maintaining the 100% ownership/management "integration" credit which had made it a close second to Fresno. [3] However, it is argued by Carta's opponents that we should not accept the substitution and "integration" pledge of Dr. Sonder without providing them an opportunity to test its amended proposal, since John Sonder had at deposition insisted that his wife could not devote time to the radio station, or take a financial interest, because of her very busy professional practice. [4] We discuss both matters.

FRESNO FM LIMITED PARTNERSHIP

4. In its application, Fresno portrayed itself as a limited partnership consisting of (1) a single "general" partner, Jesus Cruz, said to hold 15% of the overall partnership equity, and (2) three discrete "limited" partners (28.33% equity each), to wit: (a) Ray Stanfield, a California media broker; (b) Frederik Osborne, majority principal of Auburn Cablevision, Inc., the licensee of a standard broadcast station in Auburn, New York (and permittee of a new FM station in Irondequoit, New York, about which more *infra* note 13) [5] and (c) MR Associates, composed of Richard Rynd and Melvin A. Steinberg. *I. D.*, para. 10.

5. As the ALJ records at *I. D.*, paras. 11-15, the genesis of the Fresno application was Stanfield's interest in this FM facility. After failing to secure the participation of another individual (who was the part owner of KNSE (FM)), Stanfield received a telephone call from Cruz, whom he had never met, who said he was advised that Stanfield was looking for a "general" partner for the Fresno FM application. Shortly before that application was due to be filed, Cruz met with Stanfield at the latter's office near Los Angeles. Also present for that meeting was prominent communications counsel, Lewis Cohen, who has perchance represented Osborne (and/or Auburn Cablevision) in other licensing proceedings. That meeting, of December 22, 1986, lasted approximately one hour, at which time it is claimed that Cruz was, there and then, made Fresno's sole "general" partner, with exclusive control over the equity, and the "limited" partners absolutely prohibited, *ad infinitum*, from communicating with Cruz about the prosecution of the application or the future operational aspects of the proposed station.

6. Prior to that very brief meeting, Stanfield and Cruz had never met, and have not met since. Nor has Cruz met any of the other "limited" partners (*i.e.*, Osborne, Rynd, and Steinberg). Moreover:

> At this meeting, Cruz reviewed with Cohen the contents of a draft limited partnership which was complete except for information such as the identities of the principals, the location and the name of the applicant. Cruz filled in these blanks (Tr. 109-211, 240). The partnership agreement was signed on December 24, 1986 (Tr. 213). Also, at the December 22 meeting, Cruz and Cohen went over a blank application form (Form 301) line by line (Tr. 281). Cruz did not provide information about the

limited partners called for in the form. Cohen had secured information concerning the limited partners prior to the December 22 meeting (Tr. 291).

I. D. at para. 14. At that same meeting, Cohen suggested Robert Hoover to prepare the engineering portion of the application and Greg Daily to secure a transmitter site, to which suggestions Cruz acquiesced, although he had never met, has never met since, and has never discussed the application with either individual. Cruz has not, and will not in the future, contribute capital to this venture, but says he authorized Cohen at that December 22 meeting to pay Hoover and Daily out of a $10,000 fund Cohen said had been provided by the "limited" partners. *Id.*, para. 15. (However, as will be seen, it is not clear *who* of Fresno's principals even retained *Cohen*, let alone the engineer or the site locator.)

7. Upon reviewing the exceptions of Fresno's unanimous opponents, and closely examining the record itself, we agree with the exceptors that Fresno's purported ownership structure is not a *bona fide* business arrangement, but a sham devised to exploit artificially the mechanics of the Commission's comparative process by seeking to extrapolate Cruz's putative 15% equity interest into a "perfect" 100% "integration" factor for management, local residence, broadcast experience, all of which carry heavy weight under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). [6] The limited partnership structure (were it valid) would also block the attribution of Osborne's other media interests to Fresno under the *Policy Statement's* emphasis on media diversification. *Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-35 (1986). Indeed, the Fresno "limited partnership" follows the virtually identical pattern of sham applications we have recently rejected in *Poughkeepsie Broadcasting Limited*, FCC 90R-22, released June 6, 1990, and *Metroplex Communications, Inc.*, 4 FCC Rcd 8149 (Rev. Bd. 1989). Although the record is rife with compelling indicia that Fresno's limited partnership is a burlesque, we will highlight just some of the salient evidence.

8. Bearing in mind that, apart from the fleeting encounter between Cruz and Stanfield on December 22, 1986, Cruz had (and has) never met nor spoken to any of the alleged "limited" partners, Tr. 198-200, nor have they ever exchanged resumes, *curriculum vitae*, business or credit histories (*etc.*), Tr. 203-204, it is useful to recall the Commission's bedrock perception of a legitimate limited partnership:

> Essentially, a limited partnership is a business enterprise composed of: (1) one or more general partners who exercise complete managerial control over the business' affairs *and who are personally liable for the partnership debts* ; and (2) one or more limited partners who invest capital and share in the profits, but do not exercise any managerial control and do not incur any personal debts beyond their initial capital contribution.

Minority Ownership, 92 FCC 2d 849, 854 (1982) (footnote omitted; emphasis added). Not only has Cruz contributed no capital to Fresno to date, nor does he plan to in the future, Tr. 216, he was wholly uncertain whether as the sole "general" partner he was "*personally liable for the partnership debts.*" For example, while Cruz initially testified that he believed he was personally liable for the partnership debts beyond the contribution of the "limited" partners, Tr. 216, 268-269, [7] he was shown Section 22 of Fresno's partnership agreement and asked whether that paragraph indemnified him personally from any financial losses. Thus (Tr. 273; emphases added):

> [Norman Counsel]: My question is, is it not accurate to state that in light of the language in Section 22 of the Limited Partnership Agreement, Mr. Cruz, that your personal assets could not be reached to satisfy obligations of the partnership to creditors?
>
> [Cruz]: *That is what the agreement seems to say, correct* ; although I'd like to say again I want to refer to this paragraph because you asked me specifically. *In my mind, I wasn' t all that clear about it, and if there's ever any questions on any of this, that's why I've hired an attorney. That's why I have Mr. Cohen to help me with that.* Again, if I had a question about a more specific legal matter, then I'd ask to see the agreement.
>
> [ALJ]: Well, now you've seen the agreement. *Do you agree with counsel that you have no personal liability, you're indemnified from personal liability insofar as any losses suffered by the partnership?*
>
> [Cruz]: *Yes. I understand that now more clearly than before.*

9. Not only did Cruz seem confused (indeed indifferent) as to the most fundamental question of his personal liability on behalf of his unfamiliar 85% "partners," he expressed a lack of concern over who bore the ultimate liability as between him and his "limited" partners because *"that's why I've hired an attorney* [Cohen]." Yet Cruz had earlier answered that he was told by "limited" partner Stanfield that Cohen would be counsel, that is (Tr. 191; emphases added):

> [Cruz]: He [Cohen] was the Federal Communications attorney; that he was there at the asking of Ray Stanfield to be present.
>
> [Norman Counsel]: Wasn't it your understanding that Mr. Cohen was there to assist in preparing and filing and prosecuting the application that was to be filed in the event that an arrangement could be arrived at between you and Mr. Stanfield?
>
> [Cruz]: I just said this was only to be the case in the event that we were to come to an agreement and we would indeed decide to pursue a frequency.
>
> [Counsel]: And in the event that you reached such an agreement, *it was made clear to you by Mr. Stanfield, was it not that, Mr. Cohen was going to serve as counsel for the applicant? Isn't that correct?*
>
> [Cruz]: *Yes.*

Still, despite being pressed on this matter by the curious ALJ, Cruz saw no conflict. Tr. 496-498. [8] And while purportedly responsible as "general" partner for Fresno's larger debts, Cruz did not sign a retainer agreement with counsel, and does not know if one exists. Tr. 264.

10. Not only was Cruz unfamiliar with the arrangements with "his" attorney, he did not know who had retained Fresno's engineer (Hoover) or its transmitter site locator (Daily), as demonstrated by these responses (Tr. 265-267; emphases added):

> [Norman Counsel]: Did anybody, to your knowledge, ever sign any sort of retainer or similar agreement with Mr. Hoover for his engineering services for Fresno FM?
>
> [Cruz]: Again, not to my knowledge, *but I assume he was retained and paid for and dealt with through Mr. Cohen*, my attorney, whom I authorized to do so.
>
> * * *
>
> I'll give you the chain of events here. Mr. Cohen hired Mr. Robert Hoover to become our engineer and secure us a site as well as do an engineering study. Hoover was in contact with and hired Greg Daily.
>
> [Counsel]: I'm sorry. Could you just spell that for the record?
>
> [Cruz]: Greg Daily, G-R-E-G D-A-I-L-Y. Daily. And Mr. Daily is a site locator, someone who specializes in finding adequate sites for future radio stations, and he contacted the owner of that land, Mr. Ensom.
>
> [Counsel]: To your knowledge, was there ever any retainer or similar agreement signed on behalf of Fresno FM by any party with Mr. Daily for his services on behalf of Fresno FM?
>
> [Cruz]: *Again, not to my knowledge ; but it is implied that he worked for Robert Hoover.*
>
> [Counsel]: Was it your understanding that Mr. Daily was retained by Mr. Hoover rather than by Mr. Cohen?
>
> [Cruz]: My understanding is that he was retained by Mr. Hoover.
>
> [Counsel]: *And did you have any understanding as to what fees, if any, Mr. Daily would be charging for his services to Fresno FM* ?
>
> [Cruz]: *No.*
>
> [Counsel]: *Did you ever ask* ?
>
> [Cruz]: *No, not specifically* what this gentleman specifically – we're looking at an overall operation of an engineering study, of locating a site, many variables in there. It was just a matter of what this gentleman would be paid.
>
> [Counsel]: Who told you that Mr. Daily was going to be retained for Fresno FM?
>
> [Cruz]: Mr. Cohen.

Moreover (Tr. 435-436):

> [ALJ]: So you don't know for a fact whether the engineer was already hired by the 22nd?
>
> [Cruz]: No, I don't know that personally for a fact.
>
> [ALJ]: You've never spoken to the engineer?
>
> [Cruz]: I have not.

11. Furthermore, although Cruz – as sole "general" partner – personally certified as to Fresno's financial ability to build and operate the facility (without regard to advertising revenues) during the station's inaugural phase, his testimony as to the costs of this venture further discredits the *bona fides* of the Fresno "partnership." While being questioned about prospective costs, Cruz was queried about his $72 thousand salary (about which more below), and he testified that this specific amount was allotted because "we made out a budget and we put down that amount." Tr. 226. At that point, the questioning focused more precisely (Tr. 226-227; emphases added):

> [Norman Counsel]: Well, wait a minute. Let's focus on that last statement. Who made out a budget?
>
> [Cruz]: I did.
>
> [Counsel]: Which budget are we talking about; for what?
>
> [Cruz]: A budget on which I would put down the operational budget, including the salaries of myself and the staff, operational budget for the first three months.
>
> [Counsel]: When did you prepare that?
>
> [Cruz]: Sometime during the last week of 1986.
>
> [Counsel]: What do you mean by the word budget?
>
> [Cruz]: An operational budget, what it requires to run the radio station for three months.
>
> [Counsel]: Were there specific line items you wrote down in making that budget? *I' m not interested in the figures, but were there specific line items* ?

[Cruz]: *Yes.*

[Counsel]: And they included what types of categories of expenses?

[Cruz]: *Salary of sales manager, program director, engineer, rent, like that.*

[Counsel]: I see. And you wrote these down on paper, right?

[Cruz]: *Uh - huh.*

[Counsel]: Is that a yes or a no?

[Cruz]: *That's yes.*

[Counsel]: And that was before the application was filed, correct?

[Cruz]: *Yes.*

But Cruz was then confronted with his earlier deposition testimony (Tr. 228-229, quoting deposition; emphases added):

Question: -- line 1 -- "In addition to preparing" -- and I'm quoting here -- "In addition to preparing a staffing proposal, did you prepare any other budgetary proposals?"

Answer: " *No.* "

Question: "Did you make any effort to determine what the cost to construct and operate the facility would be?"

Answer: " *I personally did not.* "

Question: "Did you ask anybody else to do that?"

Answer: "Yes, I did."

Question: "Who did you ask to do that?"

Answer: "My attorney, Lewis Cohen."

Question: "Did you have anything reduced to writing? In other words, did Mr. Cohen or anybody else put down on paper at any time prior to the time the application was filed what these costs would be?"

Answer: " *Not that I can recall.* "

The questioning continued (Tr. 234-236, quoting deposition):

Question: "This budget that you prepared, I do understand correctly that basically the numbers that you plugged into the budget in terms of estimating costs to construct and operate this station were based primarily on figures that Mr. Cohen gave you?"

Answer: "In one instance, yes."

Question: "You did not personally contact the equipment manufacturers, for example, to get estimates of costs of equipment?"

Answer: "No, not personally."

Question: "Did you personally contact anybody to get any of these costs, or did you just get these numbers from Mr. Cohen?"

Answer: "Okay. I did not contact anyone. I got these, one number especially, from Mr. Cohen."

Question: "Which was that?"

Answer: "The cost of construction of a broadcast facility in the City of Fresno."

Question: "So, you just relied on the number he gave you and made no independent investigation of what those costs would be, correct?"

Answer: "Correct."

Question: "Have you at any time made any contact with any equipment manufacturers to make some determination yourself about what the costs would be?"

Answer: "No, not in specific context of this application."

12. As to the one cost item on which Cruz was very specific, his $72 thousand per annum salary, Cruz at first suggested that the matter was discussed at the December 22, 1986 (one-hour) meeting (Tr. 217; emphases added):

[Norman Counsel]: Has the amount of that salary been ascertained as of today?

[Cruz]: Yes, it has.

[Counsel]: How much is that?

[Cruz]: About $6,000 per month.

[Counsel]: Six thousand dollars per month or $72,000 per year; is that correct?

[Cruz]: Yes, sir.

[Counsel]: *Did anyone tell you that that would be the salary you' d be receiving* ?

[ALJ]: Can you answer the question?

[Cruz]: *Yes, sir. I asked as to what might be the general salary.*

But Cruz almost immediately changed course (Tr. 217 - 218):

[Counsel]: Well, let me ask the question again because I'm not getting a responsive answer. Did anyone tell you that would be the salary you'd be getting for your services?

[Cruz]: No. I pretty much came up with that on my own.

[Counsel]: No one suggested that figure to you?

[Cruz]: No.

[Counsel]: You never had a discussion with any other individual about the amount of dollars in question? Never?

[Cruz]: No.

[Counsel]: You never discussed that issue with any of the limited partners in Fresno FM?

[Cruz]: No.

Stanfield confirmed that there was no agreement as to salary (Tr. 546):

[JMH Counsel]: Were you aware that Mr. Cruz proposes to pay himself a salary, as General Manager, of $72,000 a year?

[Stanfield]: No, I was not.

[Counsel]: Do you believe that that's a salary commensurate with the position of General Manager in the Fresno area?

[Fresno Counsel]: Objection.

[ALJ]: Overruled.

[Stanfield]: I don't know whether it is or not. I can find out very easily, but I don't know today.

13. The question of Cruz's salary may be wholly academic however, since the Fresno partnership agreement provides *only* for prosecution and construction expenses, but *not* for initial operating expenses. Fresno's written partnership agreement goes even further, and states that its written agreement constitutes the "entire understanding" between the parties. Fresno Exh. 1 at 17 (Certificate and Limited Partnership Agreement at 14, § 25.b). But, as luck would have it, and precisely as occurred in the very recent *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432 (Rev. Bd. 1990), where identical contract language *expressly* delimited the contributions of the "limited" partners in a manner that left that applicant short of financial qualifications, *see id.*, at 2435, Cruz here alleged that there existed an oral "side agreement" to provide for operating expenses. Cruz testified (Tr. 327):

[Cruz]: The prosecution of the license, the construction of the radio station and first three months of operation.

[JMH Counsel]: Where does it say first three months of operation?

[Cruz]: That is not stated here.

[Counsel]: So, you have some oral agreement to that effect?

[Cruz]: Correct.

[Counsel]: Was that something you agreed to with Mr. Stanfield in this meeting on December 22nd, or is it something he agreed to at some other time?

[Cruz]: On December 22nd.

As to his $72 thousand salary, presumably part of the *quid pro quo* for taking on unlimited liability for the Fresno partnership (although there were no negotiations), Cruz responded (Tr. 325-326):

[Counsel]: And that while the station is up and running and operating, you get paid whether the station makes any money or not, right?

[Cruz]: That's correct.

[Counsel]: And if there's no money there to pay your salary, you make a capital call and you get it from Mr. Stanfield and the other limited partners, right?

[Cruz]: That's not correct, sir.

[Counsel]: Where do you get it from?

[Cruz]: That money, I will make every effort to earn it. If I don't get enough, I can borrow it, but there's a specific limit as to what the limited partners have agreed to supply in terms of money to construct and operate the station for three months as well as prosecute the license. There's nothing there that says that I could . . . .

In other words, despite the express capital contribution terms of the Fresno contract, and despite only an alleged *oral* "side agreement" from "limited" partners Cruz had never met or *spoken* with, [9] and despite the fact that he did not personally investigate the costs of construction and operation, [10] and despite the fact that he did not negotiate either his equity share or his salary, he (thought at first he) agreed to take on unlimited liability, even if he had to personally *borrow* money to pay his own salary.

14. Stanfield was hardly more persuasive. He at first attempted to deny that his investment decision was based on his single, one-hour meeting with Cruz (Tr. 536; emphasis added):

> [JMH Counsel]: Your discussions with Mr. Cruz during that meeting and what you discussed with him on December 22nd was the sole basis for your investment decision; in other words, your decision to go forward and put money into this application with Mr. Cruz as the general partner?
>
> [Stanfield]: *No. That was not the sole basis.*

However, Stanfield was then confronted with his deposition where he had averred (Tr.536, quoting deposition; emphasis added):

> Question: "The testimony so far has been that the meeting was approximately an hour. I'm referring to that simply by way of shorthand. The meeting, however long it was, that was the sole basis that you had in terms of dealing with Mr. Cruz for making your investment decision; correct?"
>
> Answer: " *Yes.* "

Stanfield's testimony, if nothing else, did illuminate the reason for Cruz's confusion over even the most basic question of his personal liability (Tr. 538-539; emphases added):

> [Counsel]: And Mr. Cruz was told that he would not have to put any money in; correct?
>
> [Stanfield]: Correct.
>
> [Counsel]: And he was told that he would not be at any risk in connection with this application; it that correct?
>
> [Stanfield]: No, I don't think that's correct.
>
> [Counsel]: Was Mr. Cruz told that he would be indemnified for any losses that he suffered as a general partner in this application?
>
> [Stanfield]: You're referring to the conversations between Mr. Cruz and me at that meeting?
>
> [Counsel]: Yes.
>
> [Stanfield]: *I cannot tell you absolutely the depth of that discussion in terms of a proposed partnership agreement.* I think that what I conveyed to Mr. Cruz was a proposal that we would form a limited partnership, in which he would be a general partner, and that the limited partners would put up 100 percent of the money to constitute the application and to construct the station, if we were the successful applicant, or provide the funding for the first three months of operation. *I' m not comfortable with the characterization that we told him that he never had anything to lose. I don' t think that's correct.*
>
> [Counsel]: *You didn' t say that, or you don' t know if you said that ?*
>
> [Stanfield]: *I don' t recall saying that.*

15. Although Fresno seeks an extrapolated 100% quantitative ownership integration credit, based solely upon Cruz's putative 15% equity share as its general partner, the Commission has recognized:

> [S]ometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant -- and thus relevant to the Commission's integration analysis. *See e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 paras. 15-16 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 1259, 1259 para. 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.*, 102 FCC 2d 288, 292 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 424-26 paras. 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be discredited. *Victory Media*, 3 FCC Rcd 2073, 2074 para. 18 (1988).

Coast TV, 4 FCC Rcd 1786, 1787 (1989). As we recently echoed in *Metroplex Communications*, *supra*, the Commission has been confronted with a large volume of applications that disingenuously depict a two-tier ownership structure so as to exploit artificially the Commission's comparative structure, *see* 4 FCC Rcd at 8159 (and cases cited therein), and it has recently taken several steps to thwart such abuses. *See, e.g., Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3855-3858 (1989). [11]

16. Relying on *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), and *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), Fresno argues that the pre-organizational activities of its limited partners, and the lack of involvement of its general partner Cruz are not dispositive of its *bona fides* or its right to the extrapolated 100% integration credit. It claims that its limited partners have not actively managed Fresno since the application was filed.

17. "We do not disagree with Fresno that the pre-organizational activities of its limited partners are not necessarily dispositive" of likely control of its entity. *Mulkey*, 4 FCC Rcd at 5520. *See also Coast TV*, FCC 90-120, released April 27, 1990 (at paras. 12-16) (*Coast II*). Rather, as the Commission has stated, the question of whether we have before us a *bona fide* limited partnership must be answered by a review of the "totality of the record evidence." *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988). This is to say that the lack of involvement of limited partners, after the entity has been organized, does generally provide some reasonable assurance of a *bona fide* two-tier structure. However:

> This reasonable assurance can be undermined, of course, when the totality of the facts otherwise indicates that an applicant's ownership proposal is not *bona fide*. *See generally, KIST Corp.*, 102 FCC 2d 288, 292-93 (1985).

Coast II at n.4.

18. The "totality of record evidence" here undermines any claim that Fresno is a *bona fide* business arrangement or a legitimate limited partnership: (1) apart from the one hour meeting between Cruz and Stanfield, the so-called limited partners had (and have) never met Cruz, nor has he supplied them with them with a resume or *curriculum vitae*, Tr. 203-204, nor have they investigated his business background, credit history (etc.), *or vice versa;* (2) Cruz was uncertain over the *fundamental* question of whether he bore personal liability on behalf of partners he had never met, did not negotiate his equity share in consideration therefor, did not personally seek to determine legal costs, engineering costs, or any of the costs of construction or operation; (3) Cruz assumed that counsel had retained the engineer and site locator, but has never met either and has not compared or reviewed their invoices; and (4) Cruz assumed for himself a salary of $72 thousand per annum without discussing this with his partners, but does not know where his salary will come from if the station does not show an immediate profit. This entire scenario is incredible [12] and, at a minimum, unworthy of valuable and dispositive integration credit. KIST, *supra; Poughkeepsie Broadcasting, supra; Metroplex Communications, supra.* [13]

CARTA CORPORATION

19. At the time of the hearing, Carta was wholly owned by John Sonder, who was also proposed to be full-time general manager of the station. I.D., paras. 4, 6. The ALJ awarded Carta 100% ownership integration credit, with strong qualitative enhancements for his long-term local residence, his broadcast experience, and his civic participation. *Id.*, paras. 7-8, 122, 132. In addition, since the Sonders (husband and wife) proposed to divest their KXEX-AM (Fresno) in the event that Carta's instant application is granted, Carta was charged with no attributable media interests under the comparative factor of diversification of mass media control. *Id.*, paras. 5, 119. In sum, the ALJ concluded that, because of only slight differences in their respective qualitative enhancements, Carta compared ever so marginally behind Fresno. *Id.*, para. 132.

20. As indicated at the outset, subsequent to the release of the I.D. and the filing of exceptions, Carta reported the March 3, 1990 death of its sole principal, John Sonder. Shortly thereafter, Carta requested leave to amend to formally report his death and to announce that his widow, Dr. Sylvia Sonder, had succeeded to 100% voting control of Carta. Contemporaneously with its proposed amendment, Carta petitioned to reopen the record to permit it to submit evidence pertaining to substitution of Dr. Sonder for the decedent as the full-time integrated 100% principal of Carta. Carta's companion petitions are opposed on grounds that a further hearing would be required to test Dr. Sonder's proposal that she terminate her practice as a clinical psychologist and, instead, take up her late husband's reins as full-time station general manager.

21. As a general matter, the Commission permits an applicant to substitute a new integrated principal in place of one who died during the pendency of the application, and thereby maintain *(but not increase)* its integration credit. *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248-50 (1978); *Golden State Broadcasting Corp.*, 94 FCC 2d 212, 215 (Rev. Bd. 1983) (subsequent history omitted); *Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1320-21, *recon denied*,94 FCC 2d 429 (Rev. Bd. 1983), *review denied*, FCC 83-194, released December 15, 1983. In Rose, for example, the hearing designation order permitted the applicant to name another principal, who had succeeded to the decedent's ownership interest, to fill the station management role left vacant by the decedent, and to vie for the same (but no *greater)* ownership integration credit that the decedent could have sought had he lived. 68 FCC 2d at 1248-50. It is obvious that the competing applicants there were to have a full opportunity, through prehearing discovery and cross-examination at hearing, to test the integration proposal of the substituted principal. In *Peoples*, an applicant was permitted a post-hearing substitution of a principal, previously proposed for "substantial" (30-hour per week) integration, who had acquired the decedent's ownership interest in the applicant, and had changed his proposal to the decedent's projected role as full-time general manager. 92 FCC 2d at 1319-23. But no additional hearing was there required, because the competing applicants had, in fact, cross-examined the substituted principal regarding his integration proposal, and the substitute's testimony made clear that he could fulfill his greater role. *Id.*, at 1321-23 & n. 29. In *Golden State*, the Board, faced with a request to substitute persons who were not previously part of the applicant, agreed with that applicant that remand for further hearing would be required to allow cross-examination of their qualifications if the death . . . were a decisionally significant factor. 94 FCC 2d at 215 (citing *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 435 (1981)). No remand was there required either, because that applicant's distant (last-place) comparative ranking was not altered by the substitution of principals.

22. At the hearing below, John Sonder testified that his wife would have no role in ownership or running Carta's proposed station. Tr. 954. This testimony is fully consistent with his earlier statement at deposition that he was

"very positive" that she would not be involved in station operations, and that she was never intended to work at all at the station. [14] There, he had explained [15]:

> She has her own psychology practice and . . . these people need her and she has to go back more to her own practice.

Carta's opponents have had no opportunity to examine Dr. Sonder's new proposal.

CONCLUSION

23. In light of the fact that we have rejected the comparative proposal of the winner below as a transpicuous sham, and in the wake of the death of the sole stockholder of the applicant determined by the ALJ to be the closest competitor, we must here remand to permit the parties to test the proposed substitution of Carta's principal, especially considering the evidence of record relating to that substitute. [16] In the limited remand hearing, the ALJ should confine the proceedings to the integration proposal of Dr. Sonder, in the hope of an expeditious supplemental decision. As is customary, Carta may not be upgraded from a comparative standpoint, but it may be downgraded for the loss of any of her husband's personal attributes cognizable under the 1965 *Policy Statement*.

24. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Carta Corporation's proposed substitution of Dr. Sylvia Sonder for John Sonder, decedent, as sole principal and full-time general manager of the station can be credited and, if so, the effect thereof on its comparative qualifications.

25. IT IS FURTHER ORDERED, That the burdens of proceeding and proof SHALL BE on Carta Corporation.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Carta Corporation on March 22 and May 14, 1990, by Fresno FM Limited Partnership on February 12, 1990, and by JMH Broadcasting on January 26, 1990 ARE GRANTED, and the amendments ARE ACCEPTED.

27. IT IS FURTHER ORDERED, That the petition to reopen record filed by Carta Corporation on March 22, 1990 (and erratum filed April 4, 1990) IS REFERRED to the Presiding Officer, and the petition to enlarge issues filed by John Edward Ostlund on December 21, 1989 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Although the Board has here rejected the comparative proposal of Fresno FM Limited Partnership, it retains its right of review, 47 CFR § 1.115, and its status as a party. It may therefore participate in the limited remand hearing ordered herein, if it so elects.

[2] *See* Ostlund Exceptions at 8-13; Carta Exceptions at 4-22; Valley Radio Exceptions at 8-13; JMH Exceptions at 31-35; Norman Exceptions at 8-26.

[3] *See* Carta Petitions (1) To Reopen Record, and (2) For Leave to Amend, both filed March 22, 1990 (and erratum).

[4] *See, e. g.*, JMH Opposition, filed March 29, 1990; Fresno Opposition, filed April 2, 1990.

[5] *See* Ostlund Petition To Enlarge Issues, filed December 21, 1989, at 3 & 4.

[6] We also note that Fresno seeks (an extrapolated) 100% enhancement credit, because Cruz is Hispanic. *See Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989) (affirming constitutionality of Commission's minority preference policy), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990).

[7] In response to cross-examination, Cruz had initially testified (Tr. 268-269):

> [Norman Counsel]: What's your understanding of the extent of your personal liability for debts and obligations of the partnership?
>
> [Cruz]: My understanding is that I assume 100 percent of the liability in the management of the partnership.
>
> [Counsel]: I don't know that that's responsive. Let me ask it a different way. Think of this scenario. Suppose Fresno FM is the successful applicant in this proceeding. Suppose you construct the station, you get it operational and, two years down the road, Fresno FM's station is losing money hand over fist. Now, let's assume there isn't enough money in the till, so to speak, to pay for all the liabilities, all the station's liabilities that are outstanding. What's your understanding, if any, as to whether creditors of the station could come and look to your personal assets to satisfy those liabilities?
>
> [Cruz]: My understanding is that yes, indeed, if it went that far, the creditors could get into my personal assets to secure their money.
>
> [Counsel]: Are you sure about that?
>
> [Cruz]: Yes. I am.

[8] But Cruz later testified (Tr. 496-497; emphases added):

> [ALJ]: The fact of the matter is that Mr. Stanfield said that Mr. Cohen was his attorney; is that correct?
>
> [Cruz]: Right.
>
> [ALJ]: And Mr. Stanfield also indicated to you that Mr. Cohen would be the attorney for the application; isn't that true?

[Cruz]: *No.*

[ALJ]: It was not indicated to you --

[Cruz]: *No.*

[ALJ]: -- what Mr. Cohen was doing there?

[Cruz]: *No.* He was there as an FCC attorney present at the meeting, period.

[ALJ]: *But he was also Mr. Stanfield's attorney* ?

[Cruz]: *That doesn' t make him my attorney, sir.*

Stanfield had also been deposed on this matter, and had responsively averred (Tr. 533-536, quoting deposition):

Question: "In the initial -- was there ever a discussion held during that meeting"--I think that refers back to the meeting of December 22nd--"as to who would serve as communications counsel for the applicant?"

Answer: "Again, I think that was a given. I don't know that there was a discussion *per se*. I think that Mr. Cohen was there as the attorney who would represent the limited partnership. I don't recall if we discussed it at all."

Question: "He was there, I take it, at your request?"

Answer: "Yes."

Responding further to his deposition testimony, Stanfield at hearing affirmed (Tr. 534-535):

Question: "And it was already determined in your mind when you met with Mr. Cruz on the 22nd that Mr. Cohen's firm would be the attorneys for this application; right?"

Answer: "Yes, I think that's fair."

Hence, despite Cruz's earlier admission that "it was made clear to you by Mr. Stanfield . . . that Mr. Cohen was going to serve as counsel for the applicant" (Tr. 191), a proposition reaffirmed by Stanfield, Cruz later sought to evince his control over Fresno by denying that to be the case. This not only reflects a lack of complete candor, it highlights the folly in Cruz's indifference to the critical matter of his personal liability *vis a vis* Stanfield (*et al.*), because, as Cruz testified, "that's why I've hired an attorney [Cohen]."

[9] However, Cruz could not have been terribly certain about any expense commitment from the two MR Associates "limited" partners, whom he did not meet at that December 22, 1986 meeting, and has never spoken to since, because (Tr. 328-329):

[JMH Counsel]: Who made the commitment on behalf of MR Associates -- that's Mr. Rynd and Mr. Steinberg -- that they were going to pay these expenses?

[Cruz]: Lewis Cohen did.

[Counsel]: Who made the commitment on behalf of Frederik Osborne that he was going to pay these expenses?

[Cruz]: Cohen did on behalf of these gentlemen who had entrusted him to make that commitment.

[Counsel]: At the time that they had committed to Mr. Cohen to do that, they had never met you, right?

[Cruz]: Right.

[Counsel]: At the time the Limited Partnership Agreement was signed, they never met you or talked to you, right?

[Cruz]: No.

[Counsel]: No, that's not right; or no, they didn't talk to you?

[Cruz]: No, they had never talked to me.

In view of the express terms of Fresno's written contract, and the fact that he has never met or spoken to the MR Associates "limited" partners, it is all but impossible to credit Cruz's claim of an oral "side agreement" for the furnishing of initial operating expenses.

[10] Because Cruz did not compose or investigate Fresno's potential expenses, his certification of the application as to Fresno's financial qualifications was plainly false. Moreover, Fresno's financial qualifications are thrown into further doubt by the facts in the foregoing footnote as to an "oral" agreement for initial operating expenses. *But for* the fact that our action here places Fresno safely out of the running on a comparative basis, we would remand on a financial issue against it. (*See also infra* note 13.)

[11] In its Form 301 *Revision*, the Commission noted the characteristics of a number of applicants whose "integration" credit was denied, for example:

> The limited partner contributed 85% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1058, 1060 (Rev. Bd. 1986)(integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualitative enhancements for his application); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987),

review denied, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsideration granted on other grounds*, 3 FCC Rcd 6216 (Rev. Bd. 1988) (general partners materialized shortly before the application was filed, limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

4 FCC Rcd at 3867 n.41; *see also id.*, at n. 39. Clearly, many of these characteristics mark the Fresno application.

[12] Not to the contrary is *Susan S. Mulkey*. Although reversing ALJ and Board rejections of a two-tier ownership structure, the Commission there found that the sole "active" equity holder (1) "decided that the applicant should be a corporation"; (2) "elected to acquire a 10% interest" after discussing a comfortable level of financial commitment on her part; (3) "signed an interest bearing promissory note" for her equity, and would "repay the note even if [her applicant] is not successful in securing a license." 4 FCC Rcd at 5521. As the evidence in this record reflects, none of these indicia are applicable to Cruz.

[13] Furthermore, the Board has before it a Petition to Enlarge Issues, filed by Ostlund on December 21, 1989 (and responsive pleadings), in which it is asserted without material refutation that Fresno "limited" partner Frederik Osborne, owner of Auburn Cablevision, Inc., was also allegedly a "limited" partner in a recent application for an FM station in Irondequoit, New York, wherein:

> a. The applicant which initially had applied for the Irondequoit permit was Silver Broadcasting Limited Partnership ("Silver"), a limited partnership. The general partner of the applicant was identified as Richard E. Morgan, General Manager of Osborne's Station WAUB, who represented that he would terminate his connection with WAUB upon grant of his application for the Irondequoit facility. The limited partner in Silver was nowhere identified in the application.
>
> b. Upon designation for hearing in MM Docket No. 87-517 and the order of the presiding Judge (as reinforced by a Motion to Compel filed by a competing applicant), Silver identified Auburn Cablevision -- the licensee of Station WAUB and the employer of Silver's general partner -- as its limited partner.
>
> c. Silver thereafter entered into settlement agreements with the other parties in the proceeding, whereby they would dismiss their applications and Silver would obtain the FM permit. Their Joint Petition for approval of their agreements was filed on June 22, 1988, and was granted by the Judge by *Memorandum Opinion and Order*, FCC 88M-2074, released July 5, 1988.
>
> d. On November 21, 1988 -- two business days after the close of the Fresno FM hearing -- Silver's general partner executed an agreement to assign the Silver permit to his employer, Auburn Cablevision. The application which was filed seeking Commission approval for that transaction further revealed that Auburn Cablevision had provided all of the funds expended in connection with the Silver application and that the consideration for the proposed assignment was the cancellation of Silver's (and Morgan's) obligation to repay those sums. That is, Aurburn Cablevision -- and Frederik Osborne -- acquired the FM permit in return for expending the money necessary to prepare and file the application and to thereafter settle the comparative proceeding.

None of this activity involving Fresno "limited" partner Osborne was reported by Fresno in this case. *But for* the fact that we reject Fresno's limited partnership, which effectively places it out of contention for this Construction Permit, we would grant Ostlund's request to enlarge the issues and remand on an abuse of process issue against Fresno. In the Irondequoit proceeding (as in the instant case), Frederik Osborne portrayed himself as merely a passive investor "limited" partner; yet, upon settlement, the "general" partner (who had invested no capital) simply disappeared. In view of Osborne's involvement in a sham application here, conjoined with his actions in Irondequoit, we believe that substantial and material questions of fact have been raised about his *modus operandi*. The Commission has recently expressed deep concern about sham applications and abuse of process in connection with its licensing processes, and the facts of this case along with Irondequoit suggest a pattern within the ambit of those concerns. *See Revision of Application (Form 301), supra*, 4 FCC Rcd at 3855-3868; *cf. Second Notice of Further Inquiry* (BC Dkt. No. 81-742), 3 FCC Rcd 5179, 5181-5183 (1988) (abuse of process by non-*bona fide* broadcast license applicants). As it is, the matter of Osborne's conduct in these two proceedings may be raised in any other proceeding in which Osborne is a principal. *See Marlin Broadcasting of Central Florida*, Inc., 4 FCC Rcd 7945, 7957 n.18 (Rev. Bd. 1989); *cf. Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-374 (1980). We also note that Auburn Cablevision, Inc., Osborne's entity, is the licensee of one radio station and permittee of another. The Commission's Mass Media Bureau may wish to examine these subject proceedings with an eye toward determining whether action is warranted in any event.

[14] Fresno "Opposition to Petition for Leave to Amend and Petition to Reopen Record," filed April 2, 1990, Att. (Sonder Deposition) at 38, 50-51.

[15] *Id.*, at 20.

[16] The Board Chairman concurs in only the remand aspect of this action and may issue an additional statement regarding Fresno at a subsequent date. The Chairman takes a different view of applications found by the majority to have insufficient substance to qualify as *bona fide* limited partnerships. For a more complete exposition of his perceptions, *see also Poughkeepsie Broadcasting Limited, supra*, (dissent); *Anchor Broadcasting, supra;* 5 FCC Rcd at 2441 (dissent); *Renee Marie Kramer*, 5 FCC Rcd 563, 566 nn. 6, 12 (Rev. Bd. 1990) (Chairman disassociates from finding of sham limited partnership in *Metroplex Communications, supra* (Chairman there concurring in result only)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-299

In re Applications of

TARCOM COMMUNICATIONS (hereafter "Tarcom")	File No. BPH-880718MA
KAYS, INC. (hereafter "KAYS")	File No. BPH-880824MD

For Construction Permit for a
New FM Station on Channel 270 (101.9 MHz)
in Hill City, Kansas

HEARING DESIGNATION ORDER

Adopted: May 15, 1990; Released: June 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *KAYS.* On June 19, 1989, KAYS filed a petition for leave to amend its application. The late-filed amendment proposed a new transmitter site. KAYS acknowledged that the Federal Aviation Administration (FAA) had determined that its original site would not be a hazard to air navigation. However, KAYS states that the Aircraft Owners and Pilots Association (AOPA) objected to its proposal because of the proposed tower's proximity to "Route 283 which is used by general aviation pilots for navigation guidance between Hill City and Trego-Wakeeney Airports". As a result, KAYS filed the amendment proposing a new site which would remove the AOPA's objection.

3. Jurisdiction over matters involving air safety issues is deferred to the FAA for analysis and judgement. The Commission recognizes the expertise of the FAA in determining whether a proposed structure constitutes an air navigation hazard. The Commission received notification on February 17, 1989, that the original site proposed by KAYS had been cleared by the FAA as presenting no possibility of an air hazard. Consequently, we find no good cause for acceptance of the late-filed June 19, 1989 amendment. Accordingly, the petition for leave to amend will be denied and the late-filed amendment will be returned herein.

4. *Tarcom.* Tarcom proposes to mount its antenna on the existing KZNA(FM), Hill City, Kansas tower. Tarcom's proposal specifies a tower height above ground level (AGL) of 287 meters and an overall height above mean sea level (AMSL) of 1025 meters. This information does not agree with the data on file with the FAA which specifies 267 meters AGL and 1004.9 meters AMSL. Accordingly, Tarcom will be required to amend its AGL and AMSL to agree with that filed with FAA or to refile the increased heights with the FAA. Furthermore, an air hazard issue will be specified.

5. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
KAYS	February 17, 1989; February 28, 1989; July 21, 1989 October 13, 1989

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Tarcom would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed on June 19, 1989, by KAYS IS HEREBY DENIED, and the accompanying amendment IS HEREBY RETURNED.

9. IT IS FURTHER ORDERED, That Tarcom file an amendment as required by paragraph 4, above, with the presiding Administrative Law Judge or notify the Administrative Law Judge that it has refiled FAA Form 7460-1.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by KAYS ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 1.80
of the Commission's Rules
to Modify Forfeiture
Provisions

ORDER

Adopted: June 1, 1990; **Released: June 18, 1990**

By the Commission:

1. Congress recently amended section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2), which governs forfeitures that can be imposed by the Commission.[1] By this *Order* we amend section 1.80 of our rules, 47 C.F.R. § 1.80, to reflect the amended statute.

2. Under the amended statute, if the entity subject to forfeiture penalty is a broadcast station licensee or permittee, a cable television operator, or an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument of authorization issued by the Commission, the Commission may assess up to $25,000 per violation or each day of a continuing violation, provided that the total amount assessed for a continuing violation may not exceed $250,000 for any single act or failure to act. If the entity subject to forfeiture penalty is a common carrier subject to the provisions of the Communications Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the Commission may assess up to $100,000 for each violation or each day of a continuing violation, provided that the total amount assessed for a continuing violation may not exceed $1,000,000 for any single act or failure to act. In the case of any other entity subject to forfeiture penalty, the Commission may assess up to $10,000 for each violation or each day of a continuing violation, provided that the total amount assessed for a continuing violation may not exceed $75,000 for any single act or failure to act.

3. The changes to section 1.80 adopted herein merely codify in our rules recent amendments to 47 U.S.C. § 503(b)(2). Therefore, the Commission for good cause finds that compliance with the notice and comment and effective date provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. §§ 553(b)(B), 553(d)(3).

4. Accordingly, pursuant to sections 4(i), 303(r) and 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 503(b)(2), IT IS ORDERED that 47 C.F.R. § 1.80 IS AMENDED, effective **December 19, 1989,** as set forth in the Appendix below.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 1, is amended to read as follows:

I. Part 1 - Practice and Procedure.

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.80 is amended by removing in the sentence immediately following paragraph (a)(4) the phrase "(b)(1) and (b)(2)" and adding in lieu thereof the phrase "(b)(1), (b)(2), and (b)(3)."

3. Section 1.80 is amended by revising paragraphs (b)(1) and (b)(2), redesignating paragraph (b)(3) as (b)(4) and adding a new paragraph (b)(3) to be followed by the note currently following paragraph (b)(2) to read as follows:

§ 1.80 Forfeiture proceedings

* * * * *

(b) *Limits on the amount of forfeiture assessed.*

(1) If the violator is a broadcast station licensee or permittee, a cable television operator, or an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument of authorization issued by the Commission, except as otherwise noted in this paragraph, the forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act described in paragraph (a) of this section. There is no limit on forfeiture assessments for EEO violations by cable operators that occur after notification by the Commission of a potential violation. *See* section 634(f)(2) of the Communications Act.

(2) If the violator is a common carrier subject to the provisions of the Communications Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount as-

sessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act described in paragraph (a) of this section.

(3) In any case not covered in paragraph (b)(1) or (b)(2) above, the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (a) of this subsection.

* * * * *

4. Section 1.80 is amended by revising paragraph (j) to read as follows:

* * * * *

(j) *Effective date.* Amendments to paragraph (b) of this section implementing Pub. L. No. 101-239 are effective December 19, 1989.

FOOTNOTE

[1] Pub. L. No. 101-239, 135 Cong. Rec. H9343 (daily ed. Nov. 21, 1989), signed into law December 19, 1989 (to be codified at 47 U.S.C. § 503(b)(2)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-9

In re Applications of

CATALINA RADIO, A CALIFORNIA LIMITED PARTNERSHIP — File No. BPH-860529MC

CRESCENT RADIO LIMITED PARTNERSHIP — File No. BPH-860530MG

For a Construction Permit for a New FM Station on Channel 224A, Avalon, California

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1990; Released: June 18, 1990

By the Commission:

1. Catalina Radio, a California limited Partnership (Catalina Radio), and Crescent Radio limited partnership (Cresent Radio), are the sole remaining applicants for a construction permit for a new FM station to serve Avalon, California. On October 31, 1989, Crescent Radio, pursuant to 47 C.F.R. § 1.245, filed a motion to disqualify the Administrative Law Judge, Edward J. Kuhlmann.[1]

2. The presiding judge subsequently denied Crescent's motion. *Catalina Radio*, FCC 89M-2627 (Nov. 9, 1989). On November 17, 1989, Crescent filed its exceptions to the ALJ's ruling. In accordance with 47 C.F.R. § 1.245(b)(4), the ALJ then certified the matter to the Commission and suspended the hearing pending a ruling by the Commission. *Catalina Radio*, FCC 89M-2687 (Nov. 28, 1989).[2]

3. In its motion to disqualify the presiding ALJ, Crescent states that it is not seeking recusal simply because of the ALJ's rulings that were adverse to its position or interests, but that in the course of those rulings the ALJ has "by his misstatements and omissions of substantial facts and clear violation of the Commission's Rules" developed a personal bias against Crescent and its principals.

4. In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See Webster - Fuller Communications Associates*, 4 FCC Rcd 4952, 4952 ¶ 5 (1989), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment"). To be disqualifying, the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

5. As the Commission has explained, "'[u]nfavorable' interlocutory rulings by the ALJ during the hearing may be relevant to a claim of prejudice, but, without further support, they will not afford a basis for disqualifying the ALJ." *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501-02 ¶6 (1977). The rationale for this is that we presume that our Administrative Law Judges will discharge their duties in a fair and impartial manner, *Barnes*, 66 FCC 2d at 501-02 ¶6, and we therefore accord them broad discretion to regulate the course of a comparative hearing. *Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419, 419 ¶ 3 (1987). Moreover, adverse interlocutory rulings by the ALJ may, pursuant to 47 C.F.R. § 1.276, be appealed after the release of the initial decision, and any error of fact or law may be corrected on review. *Barnes*, 66 FCC 2d at 501-02 ¶ 6. Nevertheless, given the difficulty of establishing an extrajudicial source of bias, the Commission has held that "the comments and rulings of the trier of fact may be relevant to the existence of prejudice." *WWOR - TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989), citing *KAYE Broadcasting, Inc.*, 35 FCC 2d 548, 548 ¶ 3 (1972).

6. Crescent does not assert that the ALJ's bias is demonstrated by documents or discussions involving an extra-judicial source. Rather, it posits as one basis for its motion to disqualify the ALJ's ruling that Crescent will not be permitted to introduce an integration proposal at the hearing. *Memorandum Opinion and Order*, FCC 89M-2561 (Oct. 31, 1989). The ALJ's action is particularly significant because many comparative hearings are decided on the issue of ownership/management integration alone. However, without additional evidence, this ruling is insufficient to support Crescent's claim that the ALJ believes that all limited partnerships are shams and that women and minorities are incapable of operating broadcast stations. The only record citation given by Crescent is to pages 8 and 9 of the prehearing conference transcript. There the ALJ refers to what he perceived as confusion that exists with respect to the appropriate review of limited partnership agreements to determine their affect upon integration proposals. The ALJ said that his previous practice had been to rely substantially on the certification provision in FCC form 301 for evidence of proper insulation for limited partners claiming passive equity interests. However, because of recent changes in FCC Form 301, his own experience, and current decisions of the Review Board and the Commission, he was reviewing limited partnership integration proposals more carefully to assure the *bona fides* of the insulation proposal. It was in this context that he stated that of all the limited partnership agreements that he had reviewed he had seen only one that properly insulated the limited partner from integration exposure and on that one he had been reversed by the Review Board. This statement alone is not evidence of bias, and Crescent offers nothing more to substantiate its broad and extremely serious allegations.

7. Turning now to the discovery rulings Crescent alleges improperly favor Catalina, we find no evidence of disparate treatment. For each of the contested rulings the ALJ has outlined the facts and stated his reasons. *Catalina Radio*, FCC 89M-2627 (Nov. 9, 1989) and FCC 89M-2687 (Nov. 28, 1989). That the ALJ denied the rulings requested by Crescent and granted those requested by Catalina does not by itself constitute evidence of bias. In the

absence of other evidence of prejudice or bias, a pattern of unfavorable rulings that are subject to review is not sufficient to overcome the strong presumption that the ALJ has acted in a fair and impartial manner. *See Oswego Broadcasting and Communications*, 56 RR 2d 241, 242 ¶ 4 (1984). *See also Botts v. United States*, 413 F.2d 41, 44 (9th Cir. 1969). Crescent has not presented other evidence to support its claim of bias.

8. Finally, Crescent argues that various misstatements of facts in his rulings reveal the ALJ's bias. The presiding judge has given the factual setting and stated his rationale for each of the contested rulings. *Catalina Radio*, FCC 89M-2627 at ¶¶ 9-31, and *Catalina Radio*, FCC 89-2687. Insofar as the contested rulings purportedly involve errors of fact or other improper application of the Commission's rules or policies, we see no need for consideration here. To do so would violate 47 C.F.R. § 1.301 prohibiting interlocutory appeals unless authorized by the ALJ or the ruling is appealable as a matter of right. Furthermore, any errors of fact or law may be corrected on appeal and a "discontented litigant [may not] oust a judge because of adverse rulings." *See* generally *Webster - Fuller Communications Associates*, 4 FCC Rcd 4952, 4952 ¶ 5 (1989) (citing *Berger*, 255 U.S. at 31).

9. ACCORDINGLY, IT IS ORDERED, That the Exceptions to Rulings, filed November 17, 1989, by Crescent Radio Limited Partnership ARE DENIED; and that the Memorandum Opinion and Order (FCC 89M-2627 (Nov. 9, 1989)) of Administrative Law Judge Edward J. Kuhlmann denying Crescent's Motion to Disqualify Presiding Judge IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By *Order*, FCC 89M-2592 (Nov. 2, 1989), the ALJ initially dismissed Crescent's motion for failing to file an affidavit setting forth the facts alleged to constitute grounds for disqualification. Crescent subsequently filed the affidavit, and then the ALJ proceeded to consider the merits of Crescent's motion. Also, on November 2, 1989, Catalina filed an opposition to Crescent's motion to disqualify the presiding judge.

[2] Crescent also filed a Supplement to Exception to Ruling on December 18, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-65

In re Applications of

THE BALTIMORE RADIO SHOW, INC.	File No. BPH-860102NT
FIRST STATE BROADCASTING, INC.	File No. BPH-860102NX
KENT COUNTY RADIO LIMITED PARTNERSHIP	File No. BPH-860102NZ
ALFRED C. CORDON	File No. BPH-860102OA
CENTRAL DELAWARE BROADCASTING CO.	File No. BPH-860102OB

For Construction Permit for a
new FM Station at Smyrna, Delaware

ORDER

Adopted: June 7, 1990; Released: June 18, 1990

By the Commission:

1. This proceeding involves mutually exclusive applications for authority to construct and operate a new FM commercial broadcast station at Smyrna, Delaware. In an Initial Decision, the Administrative Law Judge granted the application of Kent County Radio Limited Partnership (Kent), 3 FCC Rcd 6823 (1988), and the Review Board affirmed, 4 FCC Rcd 6437 (1989). After careful review of the Review Board decision and the pleadings filed in response,[1] we conclude that the Board properly decided this matter. However, some issues warrant additional comment.

2. First, Cordon argues that the ALJ erred in accepting amendments from the other four applicants specifying a short-spaced site without a hearing to determine whether waiver of the spacing rules would serve the public interest, particularly when Cordon possessed a fully-spaced site.[2] Cordon also contends that ALJs lack delegated authority to waive spacing rules. Cordon made the same arguments in its exceptions, in response to which the Board stated that it had already reviewed the ALJ's ruling in an earlier Memorandum Opinion and Order, 3 FCC Rcd 169 (1988). 4 FCC Rcd at 6445 n.6. In that earlier decision, the Board properly affirmed the ALJ's decision on the basis that the short-spacing (.99 miles) was *de minimis* and, in essence, unobjectionable, and that the applicants had demonstrated that waiver of the spacing rules would serve the public interest by avoiding potentially serious environmental problems at the original sites. 3 FCC Rcd at 170. We note that whether Cordon's site is fully-spaced is not decisionally significant, as the Board correctly stated that in recent cases involving *de minimis* (one mile or less) short-spacings, applicants have been excused from the threshold showing that fully-spaced sites are not available provided that sufficient public interest considerations support the waiver. *Id. See Kenter Broadcasting Co.*, 62 RR 2d 1573 (1986), *aff'd Kenter v. FCC*, 816 F.2d 8 (D.C. Cir. 1987). The Board found that the avoidance of an environmental question provided a sufficient public interest justification for excusing consideration of fully-spaced sites. 3 FCC Rcd at 170. We agree. Additionally, we note that Section 0.341 of the Commission's Rules does not exclude waiver of the spacing rules from an ALJ's authority under the circumstances presented in this case.

3. Second, Cordon argues that minority and female preferences are unconstitutional. We note that the Supreme Court will consider the constitutionality of minority preferences in *Metro Broadcasting, Inc. v. FCC*, No. 89-453. [3] Moreover, the Commission is statutorily obligated not to depart from minority and female preferences. *See* Pub. L. No. 101-162, 103 Stat. 1020-21, September 21, 1989. In any event, this issue is not decisionally significant since both Kent and Central received equal minority and female preferences and would have been preferred over all the other applicants if neither Kent nor Central received these preferences.

4. Finally, Central argues that Kent's partnership agreement allows the limited partners to exercise control over the proposed station by, *inter alia*, permitting a member of the immediate family of a limited partner to perform services for the partnership, and restricting the general partner from converting her personal interest in the partnership into a corporate interest. However, Central has not demonstrated how these provisions conflict with the Commission's rules or policies regarding insulation of general partners, or otherwise warrant a different result.[4]

5. ACCORDINGLY, IT IS ORDERED, That pursuant to section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Applications for Review filed by Kent, Central, Cordon and Baltimore ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission are: separate Applications for Review filed by Kent, Central Delaware Broadcasting Co. (Central) and Alfred C. Cordon (Cordon) (formerly known as Smyrna Broadcasters Limited Partnership) September 18, 1989; Application for Review filed by The Baltimore Radio Show, Inc. (Baltimore) September 25, 1989; Opposition to Cordon's Application for Review filed by the Mass Media Bureau October 3, 1989; separate Oppositions to Cordon's and Central's Applications for Review filed by Kent October 3, 1989; Opposition to Baltimore's Application for Review filed by Kent October 10, 1989; Central's

Opposition to Applications for Review, filed October 10, 1989; Cordon's Consolidated Reply to Applications for Review, filed October 10, 1989; and Baltimore's Reply to Kent's Opposition to Application for Review, filed October 25, 1989. Section 1.115(f) of the Commission's Rules provides that replies to oppositions to applications for review of Review Board decisions shall be filed only if requested by the Commission. As the Commission did not make such a request in this case, Baltimore's October 25 Reply will not be considered.

[2] In opposing the amendments, Cordon maintained that pursuant to the rounding provisions of section 73.208(c)(8), the 63.792 kilometer spacing between its proposed site and first adjacent station WGMD(FM), Rehoboth Beach, Delaware, satisfied the minimum distance separation of 64 kilometers required by section 73.207.

[3] The Commission's award of qualitative enhancement credit for minority ownership was affirmed by the Court of Appeals in *Metro Broadcasting Inc.* v. *FCC*, 873 F.2d 347 (1989).

[4] Our disposition of this case should not be construed as giving any indication of what determination will be made with respect to the questions concerning the "Anax" Doctrine, raised in our recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd _____ (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-337

In re Applications of

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION	File No. BPED-870727MA
LOWELL MAZE JACKSON	File No. BPH-870727MD
IVAN M. MILES	File No. BPH-870727ME
JOHNSON BROADCASTING, INC.	File No. BPH-870727MF
Paul Uhry Mazo d/b/a MAZO RADIO CO.	File No. BPH-870727MJ
ROBERT W. ROUNSAVILLE	File No. BPH-870727MK
SOUTHERN RADIO SERVICES, INC.	File No. BPH-870727ML
ROSWELL BROADCAST COMMUNICATIONS, LTD.	File No. BPH-870727MM
NEW GEORGIA BROADCASTING, LTD	File No. BPH-870727MO
EATHEL HOLLEY	File No. BPH-870727MQ

For Construction Permit for a
New FM Station on Channel 298A
in Roswell, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1990; Released: June 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Section 1.301(b) of the Commission's Rules, 47 CFR §1.301(b), provides that "interlocutory rulings of the presiding officer," including denial of a petition to enlarge issues, "shall be filed only if allowed by the presiding officer." By *Memorandum Opinion and Order*, FCC 90M-481, released March 9, 1990, the Presiding Administrative Law Judge (ALJ) denied a request for leave to appeal filed by Mazo Radio Co. (Mazo) which sought to have issues added against Lowell Maze Jackson (Jackson). Nevertheless, on March 30, 1990, Mazo filed with the Board a petition for extraordinary relief (which was opposed on April 10, 1990, by Jackson). We deny Mazo's request which conflicts with well-settled Commission practice recently reiterated in *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990).

2. In *Shawn Phalen, supra*, at para. 3, the Board set forth the controlling legal principles which are applicable to the present request:

> It is well-settled Commission practice that where leave to appeal an ALJ's interlocutory ruling has been denied pursuant to 47 CFR §1.301(b), the ruling will be considered final unless egregious error or flagrant abuse of discretion is shown. *Communications Satellite Corp.*, 32 FCC 2d 533 (1971); *Ronald Sorenson*, 3 FCC Rcd 5022 (Rev. Bd. 1988); *Jan - Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983). And we have expressly held that the addition of hearing issues, which is entrusted to the ALJ by the Commission's rules, 47 CFR §1.243(k), is not a matter subject to extraordinary appellate relief. *Charisma Broadcasting Corp.*, 63 RR 2d 393 (Rev. Bd. 1987); *Jan - Di Broadcasting, Inc., supra*.

We do not perceive the type of patent or egregious legal error found in *Hanover Radio, Inc.*, 91 FCC 2d 849, 852 (Rev. Bd. 1982) where the ALJ's *Order* was inconsistent with Commission's policy "which seeks to avoid federal/state conflicts and recognizes valid local contract law." *See also Shawn Phalen, supra*, (patently erroneous financial standard applied by ALJ in remand case). We will therefore deny Mazo's petition. Of course, as provided by 47 CFR §1.301(b)(1), Mazo may renew its objections in its exceptions to the ALJ's ruling "on review of the initial decision."

3. ACCORDINGLY, IT IS ORDERED, That the petition for extraordinary relief filed March 30, 1990 by Mazo Radio, Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters
For FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations.

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 27, 1990; Released: June 19, 1990

By the Commission: Commissioner Quello dissenting and issuing a statement in which Commissioner Duggan joins; Commissioner Barrett concurring in the result and issuing a statement.

INTRODUCTION

1. The Commission has before it a Petition for Reconsideration ("Petition") filed on May 15, 1989, by the Association for Broadcast Engineering Standards ("ABES") concerning action taken in the *Third report and Order ("Third Report")* in this proceeding[1] which amended Part 73 of the Commission's Rules to provide a uniform level of protection for FM radio receivers from intermediate frequency ("IF") interference. Two FM stations are IF-related when their assigned frequencies are 10.6 or 10.8 MHz (53 or 54 channels) apart in frequency. IF interference to FM broadcast receivers may occur when they are located in an area served by two very strong signals from IF-related stations.[2]

2. In the *Third Report* we adjusted the minimum distance separation requirements for all FM stations in order to prevent overlap of their predicted 36 mV/m median field strength contours, regardless of the classes of the two IF-related stations. This adjustment replaced the former scheme of IF protection which applied fundamentally different separation requirements to different classes of stations. The effect of the former rule was that Class A stations (the most numerous) and Class C stations (the most powerful) were prevented from creating overlap of their 36 mV/m contours, while the class C1, C2, B and B1 stations were required to afford somewhat more protection. [3] The *Third Report* concluded that the additional protection was not necessary and that a uniform protection level would provide some licensees with additional flexibility in selecting transmitter sites. The *Third Report* also added a new minimum distance separation requirement applicable only to FM Channel 253 (98.5 MHz) and TV Channel 6 ("TV 6"), also based on the 36 mV/m protection level.[4]

3. ABES' Petition requests that the Commission set aside the rules adopted in the *Third Report* establishing a uniform 36 mV/m protection level for all classes of FM stations and between FM Channel 253 and TV Channel 6. It also requests that the Commission reopen the record for further study. ABES contends that the new rule was based on a preset course of action, that it failed to reflect any weighing of the showings made by ABES and by other parties who opposed the alleged "reduction" of the IF protection requirements, and that it also relied upon a study conducted by the Commission's Office of Engineering and Technology that was inconclusive and did not provide an adequate technical basis for its adoption. ABES also submits that adoption of the *Third Report* violated "Section 4 of the Administrative Procedure Act"[5] because the rule making culminating in the *Third Report* did not reflect a "reasoned process based on the thoughtful consideration of public comment."

4. Also before us in this proceeding are National Public Radio's ("NPR") Motion for Leave to Late-File Comments in Support of Petition for Reconsideration, Comments of National Public Radio In Support of Petition for Reconsideration, and Comments of the National Association of Broadcasters ("NAB") In Support of Petition for Reconsideration. The Motion of NPR will be granted, and NPR's comments will be considered on their merits.[6] In its comments, NPR contends that since public radio stations generally transmit signals that have greater audio dynamic range and commensurately lower average modulation, they will be disparately affected by IF interference. NPR also argues that the record in this proceeding supports the need for retention rather than relaxation of existing IF protection requirements; that such relaxation is contrary to the public interest unless the Commission first exercises its authority under Section 302 of the Communications Act of 1934, as amended, to establish appropriate performance standards for home receivers; and that the Commission should re-open the record because it has failed to consider potential reception by FM receivers of IF interference caused by other sources, including aeronautical navigation station assignments up to 118.9 MHz and the "TV 5 aural/FM Channel 223 relationship." NPR posits that these additional IF relationships warrant further investigation. NAB agreed with ABES that the Commission did not establish a reasonable basis for changing its protection standards and that additional, comprehensive FM receiver interference susceptibility studies are needed before the Commission can make an informed decision.

BACKGROUND

5. In BC Docket 80-90, the Commission expanded FM service to the public by increasing the number of station classes, thereby providing new opportunities for additional stations and upgrading of existing stations. Recognizing that IF interference protection standards had to be set for the newly created classes of FM stations, we decided that the existing distance separation requirements for Class B stations would apply to class B1 and C2 stations and those for Class C stations would apply to Class C1 stations. In 1986, we opened this proceeding by adopting a *Notice of Proposed Rule Making* (" *Notice* ") to reexamine some of the technical aspects of the BC Docket 80-90 decisions, including the IF protection requirements.[7]

6. The *Notice* concluded that the existing IF spacing requirements should be reexamined. The *Notice* observed that, while our intent had been to prevent the overlap of 20 mV/m field strength contours for Class A, Class B, and Class C stations, the current spacing requirements, adopt-

ed in 1965,[8] did not, in fact, prevent that overlap. The rules established in BC Docket No. 80-90 required the new classes to meet the same separation requirements as the larger classes of FM stations, even though the former generally operate at lower ERP and HAAT. The *Notice* proposed that separation requirements for the new stations be reduced to provide a 30 mV/m protection level which would have been about the same as the average of the various protection levels for Class A, Class B and Class C stations which had been assigned since 1965.

7. The record regarding IF interference compiled in response to the *Notice* was inconclusive. Some commenters stated that there is no IF interference problem and that IF spacing requirements should be abolished or relaxed for all of the station classes, new and old. Others stated that IF interference is a serious problem and that we should not change any of these requirements. Although IF interference results primarily from receiver inadequacies, we received no comments or information from receiver manufacturers or trade organizations representing receiver manufacturers. Moreover, our laboratory was then in the process of evaluating IF interference susceptibility in various categories of consumer FM broadcast receivers, and had not yet reported its findings. This led us to conclude in the *Second Report and Order* [9] that adoption at that time of minimum distance separation requirements based on the 30 mV/m protection level would have been premature. We stated that a more complete record might enable us to determine an appropriate standard and to develop minimum distance separation requirements that would provide a uniform level of protection applicable to all classes of FM stations rather than maintaining the various existing levels.

8. Consequently, we issued a *Further Notice of Proposed Rule Making* ("*Further Notice* ") in order to develop a more comprehensive record concerning the IF issue.[10] The *Further Notice* also expanded the scope of the proposal to include consideration of existing IF distance separation requirements and new requirements applicable to TV Channel 6 allotments near FM Channel 253 allotments and assignments (and vice versa).

9. In the *Further Notice*, we proposed IF minimum distance separation requirements for all FM station classes and for the TV Channel 6/FM Channel 253 pairing based on a uniform protection level of 36 mV/m. We selected 36 mV/m because it is the least restrictive level with which we have had satisfactory, long-term operating experience. We invited interested parties, particularly receiver manufacturers or organizations representing receiver manufacturers, to submit further data or test results that would support or oppose on technical grounds our choice of 36 mV/m, or to suggest an alternative protection level.

10. The comment period for the *Further Notice* was extended, following a request by the Electronics Industries Association/Consumer Electronics Group ("EIA/CEG")[11] to provide additional time for commenters to examine the technical data in a report prepared by our laboratory ("OET Study") concerning the susceptibility of commercial FM receivers to IF interference.[12] The period for reply comments was also extended in order to permit a full record to be developed.[13]

DISCUSSION

11. Initially, we hold that the adoption of the *Third Report* was consistent with the Rule Making requirements of the APA, 5 U.S.C. 553. The decision to adopt a uniform protection level of 36 mV/m was a reasonable choice supported by public interest factors and based upon careful review of the entire record, including comments filed by ABES, as well as our own experience and expertise. We based our decision to adopt a uniform protection level on a determination that there was no technical basis justifying the inconsistencies embodied in the multiple protection levels in the former rules. Those inconsistencies imposed unfair constraints upon certain classes of stations, obliging them to provide greater IF interference protection than needed. We found further justification for adopting the 36mV/m standard in our experience with the actual use of that standard, which had been both extensive and positive, without significant problems. We concluded that the extension of that standard to the other classes of FM stations would result in more reasonable and consistent treatment of FM station applications, with no significant likelihood of additional interference.[14]

12. ABES argues that our selection of a consistent standard indicates only that the Commission has affirmed consistency only for consistency's sake. ABES notes that the "Commission's rule (sic) are replete with instances where, through grandfathering or otherwise, even the same classes of stations are treated differently." ABES' contention ignores the principle that, as a general matter, it is in the public interest to eliminate inconsistencies in the Rules that lead to inequitable treatment of current licensees or applicants.[15] We believe the former IF interference protection standard imposed arbitrary and unfair constraints upon Class B1 and C1 FM stations. Although stations in these classes operate with smaller facilities (less power and/or lower antennas) than their Class B and C counterparts, they were nevertheless required to comply with a rule obliging them to be spaced just as far from other stations as stations with greater facilities. The adoption of a uniform standard remedies this inequity.

13. The *Third Report* identified increased site flexibility as a second public interest benefit that results from the adoption of a uniform standard. As the IF distance separation requirements of Section 73.207 increase, some site selection options are precluded. FM stations of the classes that, before release of the *Third Report*, were obliged to provide greater IF-related interference protection than they are required to provide under the uniform rule will now have greater flexibility in selecting their sites. ABES challenges our decision to increase site selection flexibility by arguing that "IF separation requirements are unlikely to be the critical factor in determining most FM antenna site locations. If it was, we would expect to see many more existing stations clustered at the minimum spacings established for each class combination."[16]

14. Questioning the importance of site selection flexibility, ABES also cites paragraph 26 of the *Third Report*, where the Commission acknowledged that there were only twenty-two pairs of IF-related licensed FM stations that were short-spaced under the spacings established in the rule in use before issuance of the *Third Report*. The Commission also acknowledged that under the 36 mV/m protection level it then adopted, the number of pairs of short-spaced stations would be reduced to ten. However, the small scope of the problem does not persuade us that

it is not important. Furthermore, a new Class C3 has been created.[17] Because C3 allotments are currently being made, we believe that there may be a need for the greater future site selection flexibility that is provided by the uniform protection standard. Also, because only a small number of stations appears to be currently site-constrained by the IF spacing requirements, it need not follow that there is no problem to be addressed. On the contrary, it may be a significant problem for individual stations and it would place an unfair burden on them to require a waiver justification for a criterion we do not believe is necessary.

15. Another reason for adopting the 36 mV/m protection level is that for a period of twenty-four years, there has been no demonstration, in the form of complaints or otherwise, indicating that the use of that standard creates IF interference problems either from Class A stations, which operate with the least power and the greatest degree of station-to-station proximity of all FM classes, or from Class C stations, which operate at the highest power levels and with the least degree of station-to-station proximity. By asserting that our adoption of a uniform standard is based on an inadequate record, ABES in effect argues that no positive inferences can be drawn from the absence over a twenty-year period of IF interference complaints concerning the two dominant station classes that have operated under that standard.

16. We recognize ABES' contention that the lack of complaints is due in part to the fact that few stations are operating near the old applicable minimum IF distance separation requirement. While the percentage relative to the total number of stations may be small, there are still a significant number of situations for which the protection level approaches 36 mV/m. If this signal level constitutes a problem, we should have evidence in the form of a reasonable number of interference complaints, because the IF-related signal levels will continually equal or exceed that amount over a relatively small area that is bound to include a number of households. Listeners living in or frequently traveling through areas of high IF-related signal strength are bound to notice the loss of primary service of a desired station. Thus, we believe that listeners, even though they may not understand its mode of action, nevertheless would be aware of cases of IF-related interference and report them to us. Therefore, we infer that the lack of complaints of interference deriving from use of the 36 mV/m standard for over two decades is, at the very least, more probative than not of the operational viability of that standard.

17. ABES argues that, in the *Third Report*, the Commission "based its proposal [to adopt the uniform standard] in large part on tests of FM receivers conducted by the staff of the Commission's Office of Engineering and Technology (OET)."[18] ABES states that in the Engineering Statement it submitted in support of its comments, it "showed that the results [of the OET Study] were far from conclusive and did not provide an adequate technical basis for a change in the current separation standards."[19] Specifically, ABES contends that the OET Study is flawed because "OET only tested receivers with antenna terminals and did not test the popular portable radios with self-contained antennas, such as table radios using line-cord antennas and "walkman"-type radios using headphone-cord antennas."[20] ABES argues that the study revealed a wide range of receiver performance with the poorest receivers exhibiting significant interference even at signal strengths expected in a 20 mV/m protection level environment. Based on its analysis of the OET Study, ABES concludes that OET receiver tests make it apparent that reducing the existing IF separation requirements "may cause a *significant* increase in IF-type interference." ABES takes the position that "based on *information presently available*, the IF-related separations should not be further relaxed at this time."[21]

18. We agree with ABES that the OET Study does not provide a complete picture of the FM IF interference problem, and therefore, does not permit the conclusive selection of the "correct" protection level. However, we reject ABES' argument that our adoption of a uniform standard was "based in large part" on the OET Study. Nowhere in the *Third Report* did we state that the new standard was based to any degree on the OET Study. On the contrary, our discussion of that study focused on only one aspect of the OET Study. Noting that the commenters had interpreted the OET Study in various, sometimes contradictory ways, we stated that the OET Study "says only that given two undesired IF-related FM signals of a given equal strength, the 'average' commercial FM receiver will provide satisfactory reception (free of objectionable IF interference) of a desired signal only if that desired signal has a certain minimum strength. Expressed another way, if the desired signal is strong enough, it can override the interference."[22] Clearly, this analysis of the OET Study did not state that the study provided any part of the basis for our adoption of the uniform standard. Our decision to adopt the uniform standard was based on the public interest considerations discussed *supra*.

19. We also reject ABES' conclusion that because the OET Study failed to consider a certain class of receivers, nothing can be deduced from it. The OET Study did enable us to conclude that susceptibility to IF interference varied widely among receivers of the same general class. We are aware that the OET Study did not test line-cord and "walkman" type receivers.[23] However, the addition of a new class of receivers to the study would not necessarily have supplied data that would increase the study's probative value, because the OET Study made no correlation between the tested samples and their actual distribution among listeners. There is no indication that including portable receivers would have enhanced the outcome by making such a correlation.

20. We also disagree with ABES' extrapolation from laboratory data reflected in Figure 6 of the OET Study to actual IF interference in the real world. Figure 6 does not document instances of actual IF interference in the real world, nor does it necessarily reflect a scientifically objective analysis of the degree to which conditions simulated in the laboratory represent situations in the real world. Rather, Figure 6 merely illustrates what occurs when an imbalance between undesired and desired signals is established, in which the undesired signal(s) are stronger, by varying degrees, than the desired. In the real world, however, if the desired signal is sufficiently strong to override the interference, the receiver's susceptibility will not be noticed. If the desired signal is not strong enough, then interference to certain stations will be noticed consistently over small areas. This, however, has not happened. Despite ABES' conclusion to the contrary, we have no evidence to suggest that significant real world IF interference will result from implementation of the uniform 36 mV/m protection level. In this connection, we also note that Class A and Class C stations would continue to be au-

thorized based on the 36 mV/m protection level even if we were to reverse our decision in the *Third Report*. Because these two classes comprise approximately 70% of all FM stations, only a limited percentage of applicants will be permitted to provide less IF-related protection than they now provide. Most stations will continue to be required to afford the same protection from IF interference as under the previous rule.

21. We find no evidence to support ABES' assertion that the Commission has failed to weigh information received from the receiver manufacturer industry. The Commission specifically requested comment from receiver manufacturers in both the *Notice* and the *Further Notice*. We received no comment from any manufacturers within the initial comment period of either the *Notice* or the *Further Notice*. Upon request of the EIA/CEG, which appears to represent the interests of the receiver manufacturing industry in this proceeding, however, we extended both the *Further Notice*'s comment and reply comment periods. Ultimately, EIA/CEG submitted only limited information, which we fully reviewed.

22. ABES' Petition for Reconsideration also presents no reasonable grounds for reversing our decision to require that FM Channel 253/TV 6 pairings must comply with the uniform 36 mV/m protection standard. The Petition refers to the FM Channel 253/TV 6 relationship only once in relation to the site selection flexibility issue, not to the issue of whether the uniform standard should be used in the FM Channel 253/TV 6 situation. ABES asserts that IF-related short spacings are very rare in the FM service and that the occurrence of short-spacing is "even more minuscule" in the FM Channel 253/TV 6 relation. From this, ABES infers that in selecting transmitter sites, FM stations do not consider IF-interference concerns, and that therefore the Commission is mistaken in its belief that use of the uniform protection standard will confer the public interest benefit of increased site selection flexibility. We find that this discussion by ABES about the FM Channel 253/TV 6 relation does not constitute an opposition to the rule adopting the 36 mV/m protection standard for use in that setting.[24]

23. In its supporting comments, NPR states that public radio stations, in contrast to commercial stations, transmit many of their programs using a greater audio dynamic range and commensurately lower average modulation. NPR contends that for this reason, public stations will be more adversely affected than commercial stations by IF interference. NPR also asserts that the record in this proceeding "amply supports the need for retention of current standards, rather than the relaxation of existing IF protection requirements." In support of this argument, NPR cites the OET Study and ABES' technical analyses.[25]

24. Without an actual increase in IF-related interference, however, the adverse effects that NPR predicts will not occur. As indicated above, NPR's belief that such interference will occur is not adequately supported by the OET Study or by ABES' interpretation of that study. NPR has not otherwise supported its contention with any independent studies. Consequently, we find that NPR has not demonstrated that a uniform standard will expose public radio listeners to any IF-related interference to which they would otherwise not be subject.

25. NPR states that Section 302 of the Communications Act of 1934, as amended, requires the Commission to issue receiver performance standards "which would provide for clear FM reception under the new 36 mV/m IF separations."[26] NPR believes that such standards are needed to relieve receiver owners of the costs of purchasing one or more new receivers in order to obtain satisfactory reception, in the event that reception of IF interference renders their original receivers useless. NPR contends that the "increased risk of interference to a significant number of existing receivers from increased background noise caused by the relaxation of separation requirements does not serve the public."

26. Section 302 of the Communications Act does not impose a duty on the Commission to make regulations establishing new protection standards. On the contrary, it only authorizes us to use our discretion to consider establishing such standards when to do so would further the public interest. On the basis of this record, there are no data or other evidence to persuade us to consider that new standards would further the public interest. No receiver manufacturers have stated, despite ample opportunity to do so, and no technical evidence has been presented which shows, that in a significant number of cases, the new uniform 36 mV/m standard will lead to increased IF interference. Thus there is no reasonable basis to conclude that it would be a reasonable and fair regulatory measure to impose upon manufacturers the costs of developing less susceptible or immune receivers.

27. NPR's fourth and last argument in support of ABES' Petition is that some additional sources of IF-related interference that the Commission has not considered thus far increase our need to reexamine the basis for the uniform standard. NPR, however, presents no data of any kind in support of its contention that any aeronautical navigation station or TV 5/FM Channel 223 pairings are causing IF interference. This alleged mode of IF interference was never mentioned previously in this proceeding, nor do we have any extrinsic evidence suggesting that such interference is a problem.[27] We accordingly must reject NPR's arguments on this point. Should evidence be submitted to us demonstrating that such interference does in fact exist and that it is of such magnitude as to warrant attention, we can open appropriate proceedings at that time.

28. NAB's Comments In Support of ABES' Petition for Reconsideration also fail to persuade us to reconsider our decision in the *Third Report* to adopt a uniform protection standard. Its comments merely reiterate arguments and evidence considered and rejected previously either in the instant *Memorandum Opinion and Order* or in the *Third Report*.[28]

CONCLUSION

29. The record in this proceeding demonstrates that none of our conclusions is contradicted by any methodologically sound technical study. Moreover, only one of our rationales, site selection flexibility, has been specifically opposed by ABES, and for the reasons discussed previously in para. 22, *supra*, ABES' arguments do not persuade us to reconsider our decision. We conclude that each public interest rationale supporting the uniform standard is discernible and reasonable, and that ABES' Petition has nót undermined any of those rationales on technical or non-technical grounds.

30. Accordingly, IT IS HEREBY ORDERED, That National Public Radio's Motion to Late-File Comments in Support of the Petition for Reconsideration filed by the Association for Broadcast Engineering Standards, IS GRANTED.

31. And, IT IS FURTHER ORDERED, That the Association for Broadcast Engineering Standards' Petition for Reconsideration IS DENIED.

32. And, IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Third Report and Order* in MM Docket 86-144, 4 FCC Rcd. 3557 (1989).

[2] For example, requiring IF-related FM stations "X" and "Y" to be as far apart as the distance separations specified in §73.207 should prevent a strong signal overlap area within which a receiver seeking to tune in a desired signal from a third FM station "Z" might receive interference. Such interference can manifest itself as increased background noise which degrades reception of station Z's signal. In severe cases, IF interference can prevent reception by the affected receiver of any FM stations in the area.

[3] At the time of the issuance of the *Third Report*, the following were the protection levels that resulted when maximum facility IF-related FM stations were located at the existing minimum spacings contained in Section 73.207:

CLASS RELATIONSHIP	PROTECTION LEVEL
A to A	35.6 mV/m
B1 to B1	11.5 mV/m
B to B	24.6 mV/m
C2 to C2	24.6 mV/m
C1 to C1	17.5 mV/m
C to C	36.7 mV/m

[4] While the extent to which FM reception is protected against IF interference is often discussed in terms of a protection level, the protection results from compliance with the distance separation requirements established in §73.207 of the Commission's Rules. In this proceeding, we refer to the criterion of preventing overlap of two equal contours of IF-related stations as a particular "protection level." For example, preventing overlap to two stations' 36 mV/m contours is referred to as a "36 mV/m protection level." The field strength of the overlap contour, however, is not explicitly prescribed by rule. Only the distance separation requirement is prescribed.

[5] 5 U.S.C. 553.

[6] Because consideration of NPR's comments will not impede the resolution of this matter or prejudice any of the parties, we will grant NPR's motion to late-file its supporting comments.

[7] *See Notice of Proposed Rule Making* in MM Docket 88-144, 104 FCC 2d 160 (1986).

[8] *See Report and Order* in Docket No. 15934, 5 RR 2d (P & F) 1679 (1965).

[9] *See Second Report and Order* in MM Docket 86-144, 2 FCC Rcd 5693 (1987). *recon. granted in part and denied in part*, 3 FCC Rcd 2477 (1988).

[10] *See Further Notice of Proposed Rule Making* in MM Docket 86-144, 3 FCC Rcd 1661 (1988).

[11] *See Order Granting Motion For Extension of Time For Filing Comments*, DA 88-704, 3 FCC Rcd 2818 (1988).

[12] *See* "Laboratory Test Results of the FM-IF Interference in Broadcast Receivers," Project EEB-86-8, OET Technical Memorandum FCC/OET TM 87-4, June 1987, prepared by J. Ray Hallman and Kenneth R. Nichols.

[13] *See Order Granting Request For Extension of Time To File Reply Comments*, DA 88-1184, 3 FCC Rcd 4773 (1988).

[14] *See Third Report* at paras. 28-30.

[15] Occasionally, inconsistency in the treatment of a particular class of station is unavoidable. For example, the Commission recently redefined what constitutes maximum facilities for Class A FM stations. This redefinition imposed additional spacing requirements that could not be met by some current Class A stations. Those stations are now considered "short spaced" and must be governed by "inconsistent" rules intended to permit their continuance. However, we believe that the application of inconsistent rules and policies is justified by unique circumstances intended to benefit licensees as a whole. Because we do not expect any significant increase in IF interference as a result of action taken in the *Third Report*, there is no benefit in retaining inconsistent IF separation requirements.

[16] *See* ABES' Petition at para. 7.

[17] *See First Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 2792 (1989), 54 Fed. Reg. 16363 (April 24, 1989), in which the Commission authorized the allotment of Class C3 stations and established distance separation requirements for that class, including IF interference separation requirements.

[18] *See* ABES' Petition at para. 5.

[19] *Ibid.*

[20] *Ibid.*

[21] *See* ABES' Petition at para. 6.

[22] *See Third Report* at paragraph 20.

[23] We think it reasonable to assume, however, that the performance of "walkman" type receivers may not differ significantly from the receiver models tested in the OET Study. Whereas the latter were dependent upon external antennas and probably afforded superior circuitry shielding (at least in the case of automotive receivers), portable receivers may have minimal circuitry shielding, but also less efficient receiving antennas. Therefore, depending upon the modality of IF-related signal impairment of portable receivers (i.e., whether the interfering signals are introduced through either the antenna or other receiver circuitry) a similarly wide range of receiver susceptibility is possible. Thus, we conclude that data concerning the performance of portable receivers was unlikely to affect our final decision.

[24] However, if a request for reconsideration of our adoption of the 36 mV/m protection standard for use in the FM Channel 253/TV 6 relation is considered implicit in ABES' Petition, we do not find any basis for such reconsideration. We noted in the *Third Report* that the aural transmitter of a TV station on Channel 6 is similar to that of an FM station in its potential to cause IF interference. Because of the technical similarity between IF-related TV/FM stations in this pairing and any two IF-related FM stations, our public interest rationale in support of a uniform standard and our analysis of all technical issues apply in the FM Channel 253/TV 6 setting.

[25] Specifically, NPR states that the OET Study "found that some receivers were prone to significant interference at existing 20 mV/m IF protection levels. The receivers tested were of a single type (those employing external antennas) and, according to ABES. . . are less likely to exhibit IF interference than those with internal and line cord antennas." However, no evidence has been submitted which demonstrates that this is the case.

[26] In relevant part, Section 302(a) provides as follows: "The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations. . . (2) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy."

[27] We note that the power of aeronautical navigation stations is substantially less than FM or TV stations and thus presents a much diminished interference potential. This, as well as expected better receiver front end rejection of undesired signals that are well outside of the FM band, no doubt explains why no complaint of such interference has ever been received. Therefore, no further study of this phenomenon appears necessary.

[28] In its Comments, NAB references two technical studies not mentioned by ABES in its Petition, i.e. *A Review of the FM IF Taboo in Contemporary FM Broadcast Receivers In Laboratory Tests* (filed by NAB on August 26, 1986 in Comments in this proceeding) and Comments of Greater Media, Inc.(filed July 12, 1986 with Test Results Appendix). NAB claims that these technical studies, in conjunction with the OET Study and the EIA/CEG study, provide a basis for reconsideration of the *Third Report* because they indicate that since FM receivers can suffer from IF interference under the disparate protection standards used prior to our adoption of the *Third Report*, it follows that under the allegedly less protective uniform standard adopted in that *Report*, IF interference is more likely to occur. Thus, NAB contends that if the Commission had given due consideration to these four technical studies, it would have retained the former disparate standards. We find NAB's contention without foundation because its rests upon the argument, rebutted above, that our adoption of a uniform standard was based on our interpretation of technical studies rather than on non-technical grounds. Moreover, in the *Third Report*, we discussed the technical studies contained in the NAB and Greater Media comments, finding that the record of which they are a part was inconclusive because it "does not point to any one particular protection level as an optimum choice." 4 FCC Rcd at 3559.

Dissenting Statement of
Commissioner James H. Quello
in which
Commissioner Ervin S. Duggan Joins

Re: Memorandum Opinion and Order, Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations, MM Docket No. 86-144.

I dissented from the Commission's *Third Report and Order* in this proceeding because I thought the record was insufficient to demonstrate that the 36 mV/m standard would protect against additional interference and because I believed the majority's approach exalted a desire for consistency over a concern for the technical integrity of FM radio. Nothing in the Commission's discussion of the issues on reconsideration allays these concerns. Consequently, I respectfully dissent from today's decision.

The consequences of any new rule that would tend to increase the amount of IF interference could be enormous. As the Commission most recently acknowledged in another proceeding, "IF interference has more serious consequences than co-channel and adjacent-channel interference. For example, IF interference can prevent reception of *all* FM stations in the area than just the IF-related stations." *Edens Broadcasting, Inc.*, FCC 90-126 (released April 19, 1990) (emphasis added).[1] *See also Walter P. Faber, Jr.*, 4 FCC Rcd. 5492, 5494 n.7 (1989). Given the stakes involved, one would think that the Commission has compelling proof that its new technical standards will not result in increased IF interference, or that the public interest benefits more than outweigh any incremental increase in interference. Astonishingly, neither is the case.

The Commission presents no test data documenting the interference potential of its new separation rules. Instead, the majority goes to some length to distance itself from our in-house research, stating that "[n]owhere in the *Third Report* did we state that the new standard was based to any degree on the OET Study." Order ¶18. The majority devotes considerable energy criticizing the OET Study, which the Commission acknowledges does not support "the conclusive selection of the 'correct' protection level." *Id.* In fact, the Commission expressly eschews reliance on any research, choosing instead to justify our new technical rules "on non-technical grounds." *Id.*at ¶28 n.28. While this preference not to be confused with the facts may be necessary to permit the Commission to reach the conclusion it has chosen,[2] it provides little assurance that FM stations will not face the prospect of increased interference.

Lacking theoretical support, the majority looks to the past in order to justify our future technical rules. It concludes that the lack of interference complaints arising from the 36 mV/m standard that has been applied for twenty years to Class A and Class C stations is proof that no interference will result when the standard is applied to all classes. *Id.* ¶15. But this assumes that our past experience will continue when all FM stations are operating under a more relaxed standard. It further assumes that a lack of complaints in the past accuratley reflects the experience of the listening public. As I pointed out in my dissent to the *Third Report*, most radio listeners that encounter interference are unlikely to report the problem. 4 FCC Rcd. at 3564. In any event, it is bad policy to delegate our statutory responsibility to prevent interference by establishing a "public grumbling" standard.

The majority's reliance on our previous experience with Class A and C stations also reveals the double standard it is imposing on petitioner. At the same time it relies on the historical absence of complaints, the Commission rejects petitioner's argument that site selection flexibility is unneeded "because it is based solely on data gathered in the past." Order ¶29. This "heads I win, tails you lose" tactic highlights the overall weakness of the Commission's argument for changing the IF interference rules. I continue to believe, however, that "[t]he burden in the instant proceeding should be placed squarely on those parties seeking to change our current IF separation requirements." 4 FCC Rcd. at 3563. The Commission simply has failed to meet this burden of proof.

Additionally, the purported public interest benefits of the new policy are speculative, and, even if realized, appear to be minimal.[3] While the majority "believe[s] that there *may* be a need for greater future site selection

flexibility," Order ¶14 (emphasis added), it does not identify the magnitude of this presumed need. Although it notes that the problem caused by the current separation rules is one of "small scope," it concludes that there "*may* be a significant problem for individual stations." *Id.*(emphasis added). However, as petitioner notes, very few station are operating at or near the existing permissible separation distances, and currently there are only 22 pairs of IF-related FM stations that are shortspaced under the current rule. "This is one-half of one percent of the approximately 4,200 commercial stations now authorized."[4]

Finally, I am concerned that the Memorandum Opinion and Order the Commission adopts today is inconsistent with our recent efforts to reduce interference in the AM band. At our April 12 open meeting we adopted new methods for measuring AM groundwaves and skywaves,[5] approved new procedures to allow AM broadcasters to enter agreements to reduce interference[6] and launched a rulemaking designed to result in the "transformation and revitalization of the AM broadcast service," chiefly by reducing congestion and interference in the band.[7] We also have adopted new rules pertaining to the authorized bandwidth permitted AM stations to combat interference between stations operating on nearby adjacent channels.[8] While I do not attempt to equate the problems of AM and FM radio, the Communications Act requires that we adopt regulations "to prevent interference between stations" in order to promote "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,"[9] regardless of band. By searching for uniformity among the trees of our IF interference separation rules, I fear the Commission has lost sight of the need for consistency in the forest of our statutory mandate.

I hope that I am being overly cautious and that our rule change will not lead to increases in IF interference. I hope the increase in site selection flexibility and the move toward uniformity of our separation requirements will prove to be true public benefits. But I am not convinced that the Commission has before it the evidence to answer any of these questions. Until it does, the rules should not be changed. Accordingly, I dissent.

FOOTNOTES TO STATEMENT

[1] *Edens Broadcasting* involved a request for waiver of Section 73.207 of our rules to permit short-spacing of an antenna site for a Class C FM station and therefore posed a greater risk of increased interference than does the Commission's current decision. The point is, however, that any action which creates a greater risk of IF interference can cause significant adverse effects.

[2] The OET test results suggest that increased interference may well result from relaxing the separation requirements. The OET Study detected "a wide range of performance" in the thirty receivers studied, and found" [t]he receivers which had the poorest U/D (undesired to desired) ratios exhibited significant interference even at levels typical of the existing 20 mV/m separations." *See* ABES Petition for Reconsideration at 4.

The Study may well have understated the interference potential because it did not test line-cord and the increasingly popular "walkman" type receivers which may be more susceptible to interference. Rather than seeking to collect additional data, the majority merely thinks it is "reasonable to *assume* . . . that the performance of 'walkman' type receivers *may* not differ signigicantly from the receiver models tested in the OET Study." Order at ¶19 n.23(emphasis added).

[3] While I share the Commission's interest in making our rules consistent, this interest does not outweigh countervailing concerns - particularly those related to interference. The majority acknowledges that inconsistencies may be necessary in certain circumstances, such as when a change in the rules would lead to increased interference. *Cf.* Order at ¶12 n.15.

[4] ABES Petition at 5. *See also Third Report and Order*, 4 FCC Rcd. at 3560. The minute scope of the site flexibility problem presents us with a trade-off with respect to interference potential. To the extent the new rules encourage a large number of licensees to move their facilities, the less relevant our past experience becomes. But it was this past experience-- with the old rules in place--that convinced the majority that there would be no significant increase in interference.

[5] Report and Order in MM Docket No. 88-510. Improve Methods of Calculating Groundwave Field Strength in the AM Service, FCC 90-139 (adopted April 12, 1990); Report and Order in MM Docket No. 88-508, Improved Methods of Calculating Skywave Field Strength in the AM Service, FCC 90-138 (adopted April 12, 1990).

[6] Report and Order in MM Docket No. 89-46, Amending Sections 73.1750, 73.3517 and 73.3571 of the Rules, and Revising Policies With Respect to Reduction in AM Interference, FCC 90-137 (Adopted April 12, 1990).

[7] Notice of Proposed Rulemaking in MM Docket No. 87-267, Review of the Technical Assignment Criteria for the AM Broadcast Service, FCC 90-136 (adopted April 12, 1990).

[8] Memorandum Opinion and Order in MM Docket No. 88-376, Amendment of the Commission's Rules to Improve the Quality of the AM Broadcasting Service by Reducing Adjacent Channel Interference, FCC 90-68 (released April 20, 1990).

[9] 47 U.S.C. §§ ¶ 151, 303(f).

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations MM Docket No. 86-144

Although I support the decision in this Memorandum Opinion and Order (Order), I write separately to express my concern about one aspect of this docket.[1] I am concerned that the Commission was unable to obtain specific technical findings to support the decision in this Order. The Order authorizes a uniform 36 mV/m IF distance separation requirement (separation requirement) for certain classes of FM stations. The Order cites several justifications for this action, including: (1) increased site flexibility for certain classes of FM stations; (2) the lack of interference complaints from the Commission's use of the separation requirement for Class A and Class C FM stations; and (3) the lack of technical justification for the multiple separation requirements under the former rules. The Order does not utilize specific test data to justify the new separation requirement. While I believe other factors listed in the Order offset the lack of supporting test data in this instance, I want to express my general view that, where possible, the Commission should obtain valid test data to support the selection of technical separation standards. If such data is not provided in filings from outside

parties, the Commission should obtain this information through its own resources. In this docket, the Commission, since 1986, has endeavored to obtain valid technical findings to support or refute the selection of a separation requirement. However, during the pendency of this docket, it appears that no such findings have been presented, either by outside parties or from the Commission staff. Thus, in this instance, while I support the Order based on the justifications cited therein, I am not comfortable with the lack of valid technical findings. In general, I believe such information serves an important role in determining the efficacy of a technical standard. To the extent that the findings in this Order do not reduce the technical possibility of an increase in IF interference, I am concerned.[2] Were it not for all of the other factors listed in this Order and the fact that the Commission can resolve interference complaints on a case-by-case basis, [3] my vote on this Order would have been different.

FOOTNOTES TO STATEMENT

[1] I support this Order because, after reviewing all of the factors in this docket, I believe that this action is consistent with our public interest obligations under the Communications Act. *See*, 47 U.S.C. §§ 151, 303(f). First, the Order promotes better efficiency in the allocation and licensing process for FM stations. Second, the Order does not negate the Commission's serious concerns about IF interference. Indeed, the Order does not prevent the Commission from resolving IF interference problems between stations on a case-by-case basis.

[2] I display this cautious attitude because of my support for the Commission's efforts to reduce broadcast interference in other areas. *See e.g.*, Report and Order in MM Docket No. 88-510, Improved Methods of Calculating Groundwave Field Strength in the AM Service, FCC 90-139 (adopted April 12, 1990); Report and Order in MM Docket No. 88-508, Improved Methods of Calculating Skywave Field Strength in the AM Service, FCC 90-138 (adopted April 12, 1990; Report and Order in MM Docket 89-46, Amending Sections 73.1750, 73.3517 and 73.3571 of the Rules, and Revising Policies With Respect to Reduction in AM Interference, FCC 90-137 (adopted April 12, 1990); Opinion and Order in MM Docket No. 88-376, Amendment of the Commission's Rules to Improve the Quality of the AM Broadcasting Service by Reducing Adjacent Channel Interference, FCC 90-68 (released April 20, 1990).

[3] *See*, 47 C.F.R. Sections 73.1610(b) and 73.1620(b) (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-293

In re Applications of

Mary E. Schimmenti (hereafter "Schimmenti")	File No. BPH-880818MJ
KVLI Radio, Inc. ("hereafter "KVLI")	File No. BPH-880825OA
Lake Isabella Educational Foundation Inc. (hereafter "LIEF")	File No. BPH-880825PC

For Construction Permit for a
New FM Station on Channel 283A
in Lake Isabella, California

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *LIEF.* An engineering study reveals that LIEF incorrectly calculated the antenna height above average terrain (HAAT). Using the applicant's eight radial values for height of radiation center above average terrain, our study determined the HAAT to be 384 meters. The applicant indicated an HAAT value of 375 meters in Item 7(b)(3) of Section V-B of the application. In this case, the discrepancy is neither a tenderability nor an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules. Therefore, the discrepancy may be resolved by an amendment.

3. Schimmenti petitioned for leave to amend her application on February 28, 1989. The accompanying amendment was filed after November 14, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That LIEF will be required to file within 30 days of the release of this Order an amendment correcting the engineering discrepancy detailed in paragraph 2 with the presiding Administrative Law Judge.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Schimmenti IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-292

In re Applications of

GREGORY RAY STECKLINE (hereafter "Steckline") File No. BPH-880727MO

JEANNINE T. RAINBOLT (hereafter "Rainbolt") File No. BPH-880728MV

CURTIS R. MCCLINTON, JR. (hereafter "McClinton") File No. BPH-880728NI

For Construction Permit for a
New FM Station on Channel 283A (96.3 MHz)
in Augusta, Kansas

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On July 26, 1989, the Commission released a *Report and Order* in MM Docket No. 89-54 to amend the FM *Table of Allotments*. This *Report and Order*, which became effective on September 11, 1989, changes the allocation for Augusta, Kansas, from Channel 242A to Channel 283A. Consequently, the applicants are required to amend their proposals to specify the new channel. To date, no such amendment has been received from Rainbolt. Accordingly, Rainbolt will be required to submit a post-designation amendment to specify the new allocation, to the presiding Administrative Law Judge.[1]

3. *Rainbolt.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Rainbolt would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. *McClinton.* Section III, FCC Form 301, requires an applicant to certify that sufficient net liquid assets are on hand or sufficient funds are available to construct and operate the requested facility for three months without revenue. McClinton's response to Section III indicates that he does not have the necessary funds. Accordingly, an appropriate issue will be specified.

5. McClinton petitioned for leave to amend its application after the last day for filing amendments as of right. The subject amendments was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. The sites proposed by the applicants in this proceeding conflict with a pending Rule Making proceeding RM-7256 in MM Docket No. 89-429, to allot Channel 230C2 to Andover, Kansas. At the time that the Augusta applications were tendered, the Petition for Rule Making had not been filed. Consequently, the proposals met all the spacing criteria of 47 C.F.R. Section 73.207(a) and were accepted for filing. Accordingly, these applications will be designated for hearing. However, any construction permit awarded in this proceeding will be conditioned upon the outcome of the Rule Making proceeding in Docket 89-429.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Rainbolt would constitute a hazard to air navigation.

2. To determine with respect to McClinton, whether the applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Rainbolt shall file an amendment as required by paragraph 2, above, with the presiding Administrative Law Judge within 30 days after this Order is released.

11. IT IS FURTHER ORDERED, That the petitions to deny filed by Steckline ARE DENIED to the extent noted herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That the petition for leave to amend filed by McClinton IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That in the event that a construction permit is granted in this proceeding, it shall be conditioned as specified in paragraph 6, above.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Steckline filed petitions to deny against the other applicants in this proceeding, on March 20, 1990, because they had not yet amended their applications to specify the new channel. McClinton filed an opposition to the petition, on April 2, 1990, in which he maintains he was never informed of the substitution of Channel 283A. Moreover, the opposition was accompanied by an amendment to change channels. Rainbolt has not responded to the petition. In light of the circumstances regarding the channel substitution, and the ensuing directive for the Augusta applicants to amend their applications, McClinton's April 2, 1990 amendment will be accepted for good cause pursuant to 47 C.F.R. § 73.3522(a)(2). Accordingly, the petitions to deny will be denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-355

In re Applications of

TRI-STATE BROADCASTING CO., INC.
Station KUKQ(AM)
Tempe, Arizona

File No. BR-830609UH

For Renewal of License

Jack F. Grimm
Jackie B. Grimm &
Ruth G. Clifford d/b/a
GRIMM & CLIFFORD

File No. BP-830831AB

For Construction Permit for
New AM facility at Tempe, Arizona

TRI-STATE BROADCASTING CO., INC.
Station KPUD-FM
Tempe, Arizona

File No. BRH-830609WZ

For Renewal of License

Jack F. Grimm
Jackie B. Grimm &
Ruth G. Clifford d/b/a
GRIMM & CLIFFORD

File No. BPH-830831AI

For Construction Permit for
New FM facility at Tempe, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1990; Released: June 18, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In a *Decision* in this proceeding, 5 FCC Rcd 1156 (Rev. Bd. 1990), the Review Board denied the applications for renewal of license of stations KUKQ(AM) and KUPD-FM, Tempe, Arizona, licensed to Tri-State Broadcasting Co., Inc. (Tri-State), and granted the competing applications for those facilities filed by Jack F. Grimm, Jackie B. Grimm, and Ruth G. Clifford d/b/a Grimm and Clifford (G&C). Tri-State's applications were denied pursuant to hearing Issue 1 which concerned the truthfulness of its representations to the Commission regarding Robert Melton's activities at the stations. Specifically, the issue was as follows:

> To determine whether Tri-State Broadcasting Co., Inc. misrepresented and/or lacked candor in its representations to the Commission about the participation of Robert Melton in the operation of KUKQ-AM and KUPD-FM and the ownership of Tri-State Broadcasting. And to determine the effect of those findings on Tri-State Broadcasting's basic qualifications.

Because the Board resolved this issue adversely to Tri-State, we found it unnecessary to decide two other qualifying issues designated against that applicant. Now before the Board is a petition for reconsideration filed April 6, 1990 by Tri-State. Oppositions to the petition were filed April 19, 1990 by G&C and the Mass Media Bureau, and Tri-State filed a consolidated reply on May 1, 1990. [1]

2. In support of its petition, Tri-State argues initially that the Board improperly disqualified it under the "Melton" issue (Issue 1) primarily for lack of candor during the hearing proceeding itself -- without designation or trial of a separate issue -- in contravention of the Court's narrow holding in *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1971), *cert. denied*, 456 U.S. 927 (1982). Tri-State also contends that the Board ignored all the testimony it relied on to establish that it had been truthful with the Commission. In this regard, Tri-State argues that the Board's lack of candor findings were based on the erroneous, speculative, or otherwise flawed testimony of certain station employees. Tri-State also submits that, to the extent the Board relied on the ALJ's credibility and demeanor findings in its *de novo* review of the record, it erred because the ALJ's findings were materially wrong in numerous specific instances. Tri-State further contends that the ALJ also denied it administrative due process by arbitrarily assigning it both evidentiary burdens and refusing its request to reallocate the burden of proceeding to G&C. Finally, on the so-called "Melton" issue, Tri-State argues that both the ALJ's and the Board's findings of fact reflect G&C's one-sided account of the record, and that the Board should make additional findings more reflective of Tri-State's extensive proposed findings of fact and of its hearing witnesses' testimony. Tri-State also requests that the Board review the two other basic qualifying issues which were decided adversely to it by the ALJ -- Issue 2, involving a violation of Arizona criminal law by Tri-State principal John Norris, and Issue 3, a public file issue. In Tri-State's view, the Board's failure to decide these issues is contrary to the requirements of 47 CFR §1.282(b)(1) which specifies that Board decisions contain "findings of fact and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented in the record." Lastly, Tri-State contends that the Board erred in refusing to reverse the ALJ's denial of its request to add financial and related misrepresentation issues against G&C.

3. In opposition to Tri-State's petition, G&C argues that Tri-State was properly disqualified for misrepresentation. Specifically, it contends that the issue specified was broader than described by Tri-State and that the *RKO General* case is distinguishable because it did not involve a designated misrepresentation issue. G&C also contends that the evidentiary burdens were correctly allocated un-

der the misrepresentation issue and that G&C produced sufficient evidence to meet the burden of proceeding in any case. G&C further submits that there is abundant record evidence supporting the Board's finding of a disqualifying misrepresentation on Tri-State's part. In this regard, G&C also argues that the allegedly erroneous findings made by the ALJ were in fact correct and that, accordingly, the Board properly upheld the ALJ's adverse credibility and demeanor findings. As for hearing Issues 2 and 3, G&C contends that the disqualification of Tri-State for fundamental dishonesty makes resolution of those issues unnecessary. Finally, with regard to the ALJ's denial of Tri-State's petition to enlarge issues against G&C on financial and misrepresentation grounds, G&C maintains that Tri-State's allegations were identical to those advanced by it in a pre-designation pleading and rejected in the *Hearing Designation Order*, 50 Fed. Reg. 49610 (1985)(*HDO*).

4. The Bureau also opposes Tri-State's request that its disqualification for misrepresentation be reconsidered. The Bureau maintains that Tri-State's disqualification was not solely the result of its hearing testimony but was based on a pattern of misrepresentation that began in 1974 and continued through the hearing. Even so, the Bureau argues, citing *Silver Star Communications, Inc.*, 3 FCC Rcd 6342 (Rev.Bd. 1988), the lack of candor at hearing was so pronounced that a separate issue was unnecessary. The Bureau also argues that, despite Tri-State's protestations of innocence, the record establishes that Robert Melton had a managerial role at the station notwithstanding contrary representations to the Commission. The Bureau also supports the ALJ's treatment of the evidentiary burdens as being within his discretion in conducting the hearing, citing *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), and agrees with the Board's refusal to reach the other issues pending against Tri-State. It also concludes that the ALJ did not err in declining to add a financial issue against G&C.

5. In reply, Tri-State reiterates that the hearing record does not support a finding of deliberate deceit on its part. Specifically, Tri-State argues that its disqualification was not based on the designated issue dealing with its representations during the 1974-1978 period but on its hearing testimony. This action was improper, Tri- State maintains, absent a specific issue. In this regard, Tri-States notes that its petition cited eight specific factual errors by the ALJ which directly undercut the credibility and demeanor findings relied on by the Board. Finally, Tri-State again requests that the Board consider and rule on the two other basic issues specified against it.

6. We will deny Tri-State's petition for reconsideration in all respects. Initially it must be noted upon review of the pleadings summarized above that Tri-State's arguments in the main are repetitive of matters already fully considered by the Board in its *Decision*. Because it is a long held and universally applied tenet of administrative law procedure that reconsideration will not be granted "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken, " *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff' d sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966), Tri-State's petition must largely be denied for this reason. Thus, we reject Tri-State's challenge to the specific evidentiary analysis undertaken by the ALJ and the Board under the disqualifying misrepresentation issue. *See , e.g., Northampton Media Associates*, FCC 90-176, released May 17, 1990, at para. 4. Suffice it to say that the Board's examination of this issue, far from being selective and one-sided as alleged by Tri-State, was an extensive *de novo* review of the record comprising seventy-three paragraphs of factual findings and including evaluation of all eight witnesses called by Tri-State and all six former employees of the Tri-State stations called by G&C concerning Melton's activities. Contrary to Tri-State's suggestion, this witness testimony was critically evaluated and found to support the ALJ's credibility and demeanor findings. *See Decision*, n. 7. In addition, because in our view Tri-State's representations concerning Melton's role and activities at the stations were central to the ultimate resolution of the proceeding, we undertook an exhaustive examination of the direct and circumstantial evidence in all key areas including: Melton's role in a 1974 equipment lease agreement, Melton's statements in his federal income tax returns, Tri-State's representations regarding Melton in its annual reports to the State of Arizona, Melton's sales activities during the time from 1974 to 1978 when he was purportedly a mere station salesman, Melton's activities regarding reciprocal trade advertising accounts, the terms of Melton's 1978 acquisition of an ownership interest in the Tri-State stations, and finally, the role and activities of Barry Leverant, Tri-State's purported general manager during the critical period in question. In sum, we believe that we have engaged in a thorough and even-handed review of all the pertinent evidence under the dispositive misrepresentation issue and will not rehash that analysis now.

7. Tri-State's other contentions are equally unpersuasive. Specifically, we disagree that Tri-State's disqualification was premised exclusively on the lack of candor it displayed at the hearing in contravention of the strict standards set forth by the court in *RKO General, supra*. The Board initially notes that its holding was broad-based and relied only in part on the kind of egregrious lack of candor identified in *RKO General*. Whereas that case acknowledged that no specific misrepresentation issue had been specified concerning the licensee's failure to fully and accurately report the ongoing SEC investigation into its parent company's operations, a specific misrepresentation issue was here specified against Tri-State, *was* fully tried by the ALJ, and *was* reviewed by the Board. Contrary to Tri-State's contention, it had full notice of the nature of its alleged misconduct not only from the express designation of a particularized issue (*see* para. 1, *supra*), but also from the ALJ's language in adding the issue:

> It appears that Tri-State's representations about Robert Melton's role have been incomplete and inaccurate. Questions have been raised about what his role was during the period preceding the January 24, 1978 letter and, in addition, about the accuracy of Tri-State's representations to the Commission about his role after January 24 . . . . Because the Commission attached substantial importance to Mr. Melton's exclusion when it assigned the licenses for KUKQ and KUPD to Tri-State, Mr. Norris was on notice that any representation about Mr. Melton's participation in operating the station required a high level of specificity and accuracy.

Memorandum Opinion and Order, FCC 86M-723, released February 27, 1986, para. 6. Where a party "understand[s] exactly what the issues are when the proceedings are had [it] cannot thereafter claim surprise or lack of due process . . . ." *Kuhn v. CAB*, 183 F.2d 839, 842 (D.C. Cir. 1950). Pursuant to this specific issue, the Board reviewed and affirmed the ALJ's credibility and demeanor findings adverse to Tri-State (*Decision*, paras. 99-100), and went on to hold that "contrary to Tri-State's 1974 representations to the Commission," Melton was not stripped of dominion at the stations and confined to sales, but was in fact little involved in sales and exercised "proprietary dominion over the station," that Barry Leverant's alleged position as general manager was "eyewash," and that the 1978 "sale" of 49% of Tri-State's equity was an "artifice intended to recognize *de jure* what was Melton's *de facto* interest all along." (*Decision*, para. 101.) The supporting evidence included the fact that no witness recalled any sales activities on Melton's part during the period in question, that Melton made unrestricted use at the time of a "king's treasure" of station trades for his personal enjoyment, that the 1978 price paid by Melton for a 49% share of Tri-State bore no realistic relationship to the stations' value, and that Leverant's purported role as general manager was unsupported by his actual activities. (*Decision*, paras. 102-104.) Upon *de novo* review of the totality of the evidence under Issue 1, we concluded that "no rational inference may be drawn except that, from 1974 to 1978, Robert Melton was no less Norris' *de facto* partner than he was slated to become in 1974, and only formally so clothed in 1978. Or, that Barry Leverant was much more than *trompe l' oeil*. " (*Decision*, para. 113.) In sum, we did more than simply discredit the hearing testimony of Tri-State's principals -- albeit candorless testimony has always been unacceptable in FCC proceedings, *see, e.g., Grenco, Inc.*, 39 FCC 2d 732 (1973); *Nick J. Chaconas*, 28 FCC 2d 231 (1971), and was so here -- but based disqualification on a thorough examination of the record evidence of the activities of Robert Melton and the other key players at the stations from 1974-1978, as required under the designated misrepresentation issue.

8. Tri-State's complaints about carrying both evidentiary burdens under the misrepresentation issue and its objection to the ALJ's refusal to add a financial issue against its opponent were matters discussed in our *Decision* and are not entitled to further consideration. *See, e.g., Warren Price Communications, Inc.*, FCC 90-175, released May 10, 1990. It suffices to point out that we held at para. 111 of our *Decision*, that had Tri-State excepted to the allocation of burdens (which it now claims it did), we would apply the general rule that a licensee with "peculiar knowledge of operative facts concerning alleged misconduct" must bear both evidentiary burdens. *TeleSTAR, Inc.*, 2 FCC Rcd 7352, 7353 (1987); *Granbury Communications Co.*, 68 FCC 2d 966, 969 (1978). As for the ALJ's refusal to add the issues Tri-State requested against G&C, our *Decision*, at para. 118, held that this was a matter fully discussed in the *HDO* and not within the Board's or ALJ's province to revisit. [2]

9. Finally, we turn to Tri-State's contention that the Board's refusal to decide hearing Issues 2 and 3 is a violation of 47 CFR §1.282(b), governing final Decisions of the Commission or the Board. [3] Tri-State's citation to that rule is incomplete and omits the following pertinent language from subsection (b)(2):

> (b) The final decision shall contain:
>
> * * *
>
> (2) Rulings on each relevant and material exception filed; the Commission will deny irrelevant exceptions, or those which are not of decisional significance, without a specific statement of reasons prescribed by paragraph (b) (1) of this section.

The latter provision expressly authorizes the Board to focus only on relevant and material exceptions, and to limit its decisions to matters it deems to be of decisional significance. Plainly, in this case, we considered the misrepresentation issue to be "central to the determination of the outcome of this proceeding" (*Decision*, para. 20); and, once that issue was resolved adverse to Tri-State, we found it superfluous to decide whether Tri-State should be cumulatively disqualified on other grounds as well. (*Decision*, paras. 115-116.) In this regard, the Board was following a long-standing practice. For example, in *Brainerd Broadcasting Co.*, 4 RR 2d 547 (Rev. Bd. 1965), the Board denied an application because of noncompliance with a technical rule and declined to decide other qualifying issues. We held that:

> . . . [I]t should be noted that a resolution of the character qualifications issue in the instant proceeding would not be of decisional significance, inasmuch as the Board concluded on other grounds that the application should in any event be denied. In not resolving an issue which is not of decisional significance, the Board has adhered to its usual practice and to the practice generally followed by the Commission. [2] This appellate practice has as its underlying premise the view that the resolution of an issue which has become academic is a useless exercise and does not serve to expedite the administrative process.

[2] This practice has met with the approval of the Court of Appeals. *See Deep South Broadcasting Co. v. FCC*, 278 F2d 264, 19 RR 2063 (D.C. Cir., 1960); *Guinan v. FCC*, 297 F2d 782, 22 RR 2026 (D.C. Cir., 1961).

Id., at 549; *see also 62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1774 (Rev. 1989), *rev. denied*, FCC 90-48, released February 13, 1990. Tri-State's arguments are rejected. [4]

10. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed April 6, 1990, and the motion for scheduling of reargument filed May 1, 1990 by Tri-State Broadcasting Company, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] On May 1, 1990, Tri-State also filed a motion requesting scheduling of a further oral argument; oppositions were filed May 3, 1990 by G&C and May 10, 1990 by the Mass Media Bureau. We will deny this request. The Board has already heard oral argument on the key issues in this proceeding. Oral argument is discretionary (47 C.F.R. 1.277(c)) and is customarily granted (as was the case here) only on initial exceptions to Initial Decisions and not on reconsideration petitions. Here, there is no reason to depart from our traditional practice because, as indicated in the textual discussion hereinafter, Tri-State's arguments are largely repetitive and no purpose would be served, other than further delay, by conducting another argument, particularly where the positions of the parties have already been well ventilated in their many pleadings.

[2] Although Tri-State replied to G&C's opposition pleading, it did not dispute G&C's assertion that the allegations in Tri-State's petition to enlarge were the same as those rejected by the *HDO*.

[3] We disagree with G&C that Section 1.282, by its terms, only applies to Commission final decisions. Under 47 CFR § 1.271, pertaining to delegation of review functions in adjudicatory cases to the Review Board, the Board "shall exercise the authority and perform the functions which would otherwise have been performed by the Commission under §1.273 through §1.282."

[4] Board Chairman Marino joins only in paragraph 9 of this *Order* and adheres to the views set out in his Separate Statement, 5 FCC Rcd at 1175-1176.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-308

In the Matter of

Amendment of Section 73.202(b), RM-7173
Table of Allotments,
FM Broadcast Stations.
(Statesboro, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 6, 1990; Released: June 19, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Pamela H. Hodges (petitioner), permittee of Station WUUF(FM), Channel 275A, Statesboro, Georgia, the Commission considers herein a petition for rule making proposing the substitution of Channel 275C3 for Channel 275A at Statesboro, and the modification of her construction permit for Station WUUF(FM) to specify operation on Channel 275C3. Petitioner states her intention to apply for the channel, if allotted.

2. Channel 275C3 can be allotted to Statesboro in compliance with the Commission's minimum distance separation requirements with a site restriction 13.6 kilometers (8.5 miles) west[1] in order to avoid a short-spacing to Station WIVY(FM), Channel 275C, Jacksonville, Florida, and Station WBHC(FM), Channel 276A, Hampton, South Carolina.

3. As requested, we shall propose to modify the construction permit for Station WUUF(FM) at Statesboro to specify operation on Channel 275C3 in lieu of Channel 275A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require the petitioner to demonstrate the availability of an additional equivalent channel at Statesboro.

4. In view of the fact that Statesboro could receive an additional wide coverage area FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Statesboro, Georgia	261C2, 275A	261C2, 275C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 10, 1990,** and reply comments on or before **August 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Alan C. Campbell
Peter H. Doyle
Dow, Lohnes, & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 275C3 at Statesboro are North Latitude 32-24-00 and West Longitude 81-55-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-307

In the Matter of

Amendment of Section 73.202(b), RM-7297
Table of Allotments,
FM Broadcast Stations.
(South Waverly, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 5, 1990; Released: June 19, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Kevin M. Fitzgerald (petitioner), requesting the allotment of Channel 241A to South Waverly, Pennsylvania, as the community's first local broadcast service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 241A can be allotted to South Waverly in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7.0 miles) west to avoid a short-spacing to Station WFLR-FM, Channel 240A, Dundee, New York, and Station WPEL-FM, Channel 243B, Montrose, Pennsylvania.[1] Canadian concurrence in the allotment is required since South Waverly is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 241A to South Waverly, Pennsylvania, since it could provide the community with its first local broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Waverly, Pennsylvania	--	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 10, 1990,** and reply comments on or before **August 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kevin M. Fitzgerald
P.O. Box 701
Clarks Summit, Pennsylvania 18411
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-59-46 and West Longitude 76-40-26. Because this allotment is proposed as a result of a petition for rule making filed prior to October 2, 1989, the applicants for this channel, if allotted, could avail themselves of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-306

In the Matter of

Amendment of Section 73.202(b), RM-7189
Table of Allotments,
FM Broadcast Stations.
(Watertown, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 5, 1990; Released: June 19, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Louis D. Bolton, II (petitioner), permittee of Channel 271A, Watertown, Florida, the Commission considers herein a petition for rule making proposing the substitution of Channel 271C3 for Channel 271A at Watertown, and the modification of his construction permit (BPH-871202MF) to specify operation on the higher class channel.

2. The allotment of Channel 271C3 can be made in compliance with the Commission's minimum distance separation requirements with a site restriction 8.9 kilometers (5.5 miles) northwest[1] in order to avoid a short-spacing to Station WTRS-FM, Channel 272C2, Dunnellon, Florida.

3. As requested, we shall propose to modify the construction permit at Watertown to specify operation on Channel 271C3 in lieu of Channel 271A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require the petitioner to demonstrate the availability of an additional equivalent channel at Watertown.

4. In view of the fact that Watertown could receive a wide coverage area FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Watertown, Florida	271A	271C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 10, 1990,** and reply comments on or before **August 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark J. Prak
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271C3 at Watertown are North Latitude 30-13-00 and West Longitude 82-41-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 19, 1990

PETITION FOR DECLARATORY RULING AND EXPEDITED RELIEF CREDIT CARD CALLING SYSTEMS, INC.

File No. DFD 90-81

Credit Card Calling Systems, Inc. (CCCS) has filed a Petition for Declaratory Ruling and Expedited Relief requesting that the Commission find unlawful a contract between the American Telephone and Telegraph Co. (AT&T) and the Army and Air Force Exchange Service (AAFES) for public coinless payphone service to the United States from U.S. military installations in eight European countries. CCCS asserts that the contract violates Sections 201 and 202 of the Communications Act of 1934, as amended (the Act) because it allegedly does not permit access to interexchange carriers other than AT&T from the public coinless telephones called for in the contract; that the contract violates Section 314 of the Act because it awards to AT&T a protected monopoly for the provision of public coinless payphone service from U.S. military installations to the United states; and that the contract is inconsistent with the Commission's international competitive policies. CCCS urges the Commission to issue the requested ruling on an expedited basis.

Interested parties may file comments on the CCCS petition on or before **July 6, 1990;** reply comments may be filed on or before **July 23, 1990.** An original plus five copies of comments and/or reply comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

The CCCS petition is, and comments and reply comments will be when filed, available for inspection and copying in the Public Reference Room, Room 6220, 2025 M. Street. N.W. Washington, D.C. 8:30 AM - 12:30 PM and 1:30 PM - 3:00 PM, Monday - Thursday. Copies of the petition, comments and reply comments may also be obtained from the International Transcription Service, Inc., Suite 140, 2100 M. Street, N.W. Washington, D.C. 20037, (202) 857-3800.

For further information contact Patrick Donovan (202) 634-1832.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO TELE-COM, INC. File No. I-T-C-90-055

Application for authority to operate as an international resale carrier

ERRATUM

Released: June 20, 1990

By the Chief, International Facilities Division:

1. By letter dated June 13, 1990, from the applicant in the above-captioned matter, we were informed that the name appearing on the Commission's Order released June 6, 1990, DA 90-790, did not reflect the name that has been registered with the Puerto Rico Department of State. The applicant noted that it had intended to register the name Puerto Rico Tele-Com Corp., but due to an error which apparently arose because of a Spanish/English language miscommunication, the name Puerto Rico Telecom Corporation was actually registered with the Puerto Rico Department of State. Accordingly, the Commission's Order released June 6, 1990, DA 90-790, is hereby modified to reflect that the name of the applicant is Puerto Rico Telecom Corporation.[1]

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The applicant states that it will be doing business as Puerto Rico Tele-Com.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-50

In re Applications of

CASHMERE VALLEY BROADCASTERS	File No. BPH-870904MP
UPPER VALLEY BROADCASTING CORPORATION	File No.BPH-870908MB
CASHMERE VALLEY BROADCASTING PARTNERSHIP	File No. BPH-870908MP

For Construction Permit for
New FM Station, Channel 266A,
Cashmere, Washington

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1990; Released: June 22, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is an Appeal filed on May 25, 1990 by the Commission's Mass Media Bureau (Bureau), pursuant to 47 CFR §1.302, to a *Memorandum Opinion and Order*, FCC 90M-1205, released May 15, 1990 (*MO & O II*), by Administrative Law Judge Walter C. Miller (ALJ).

2. By *Memorandum Opinion and Order*, FCC 90M-617, released March 26, 1990 (*MO & O I*), the ALJ dismissed the applications of the three captioned applicants (who were all proceeding *pro se)* for failure to file appropriate Notices of Appearance, pursuant to 47 CFR §1.221(c), and the requisite hearing fees. Apparently, however, the parties had proffered some documents to the ALJ purporting to settle the proceeding. Following the dismissal of their applications, the parties petitioned the ALJ for reconsideration. The ALJ, noting that all settlement documents were then in order, granted reconsideration, approved the settlement agreement, and terminated the proceeding by his *MO & O II*, released May 15, 1990.

3. In its Appeal, the Bureau, while stating that it finds the settlement agreement satisfactory and in the public interest, asserts only that the ALJ lost jurisdiction once he dismissed the pending applications, citing *Carroll, Carroll, & Rowland*, 4 FCC Rcd 7149 (Rev. Bd. 1989), and thus could not grant reconsideration. The Bureau is correct. As indicated in *Carroll*, 47 CFR §1.106 (petitions for reconsideration) does not apply to final rulings by ALJ's.

4. However, the parties have now filed with the Board (on June 7, 1990) all of the appropriate documents required to settle and terminate this proceeding, including (1) an amendment of Upper Valley Broadcasting Corporation (UVBC) to (a) provide the information required in the *Hearing Designation Order*, 5 FCC Rcd 992 (1990) (engineering data); and (b) amend UVBC's ownership structure (to correspond to the proposed settlement); (2) appropriate Notices of Appearance; (3) a "Joint Petition for Approval of Settlement Agreement"; (4) the "Joint Settlement and Merger Agreement"; and, (5) declarations of the respective applicant principals. Because the Board now has jurisdiction over this proceeding, we will address the proposed settlement.

5. Pursuant to the settlement agreement, Cashmere Valley Broadcasters will dismiss its application, and UVBC will pay that applicant $3,000 as consideration therefor; Cashmere Valley Broadcasting Partnership (CVBP) will pay UVBC $1,500, and CVBP will merge with UVBC by receiving one-third of UVBC's corporate stock. CVBP will also dismiss its application.

6. With its amendment, UVBC is fully qualified to construct and operate as proposed. Further, pursuant to Section 73.3525 of the Commission's Rules, 47 CFR §73.3525 (which implements 47 U.S.C. §311(c), as amended), the parties have submitted their proposed settlement agreement, accompanied by the required declarations indicating that their respective applications were filed in good faith and not for the purposes of reaching or carrying out a settlement agreement. The parties indicate that the proposed settlement agreement will be in the public interest, and that it will conserve the resources of the Commission and will expedite initiation of new FM broadcast service at Cashmere, Washington. As noted above, the Bureau has previously reviewed these documents and believes that the proposed settlement is in the public interest. In light of the foregoing, and in the absence of any basic qualifying issues extant against any party, we find no impediment to the amicable settlement of this proceeding.

7. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed May 25, 1990, by the Commission's Mass Media Bureau IS GRANTED; and the ALJ's *Memorandum Opinion and Order*, FCC 90M-1205, released May 15, 1990, IS VACATED;

8. IT IS FURTHER ORDERED, That the applications of Cashmere Valley Broadcasters, Upper Valley Broadcasting Partnership, and Cashmere Valley Broadcasting Partnership ARE REINSTATED in this proceeding; and,

9. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Upper Valley Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and,

10. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreement filed by the captioned parties IS GRANTED, and the attached settlement and merger agreement IS APPROVED; and,

11. IT IS FURTHER ORDERED, That the applications of Cashmere Valley Broadcasters (File No. BPH-870904MP) and Cashmere Valley Broadcasting Partnership (File No. BPH-870908MP), ARE DISMISSED with prejudice, and the application of Upper Valley Broadcasting Corporation (File No. BPH-870908MB), for a new Class A FM facility at Cashmere, Washington, IS GRANTED; and,

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-540

In re Applications of

CSJ INVESTMENTS, INC. — File No. BPH-870615MK

David H. Smith, Maureen L. Smith, James E. Spisiak, Patricia B. Spisiak d/b/a KEYS BROADCASTING SYSTEM — File No. BPH-870615MW

SOUTH STAR COMMUNICATIONS, INC. — File No. BPH-870615ND

For Construction Permit for
New FM Station, Channel 300C1,
Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1990; Released: June 22, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Now before the Review Board is a styled "Appeal as of Right" filed May 14, 1990 by South Star Communications, Inc. (South Star), purportedly filed pursuant to 47 CFR §1.301, seeking reversal of the dismissal of its application from the captioned proceeding. *See Memorandum Opinion and Order*, FCC 90M-1043, released May 2, 1990 (*MO & O*), by Administrative Law Judge Joseph Chachkin (ALJ). Keys Broadcasting System and CSJ Investments, Inc. (CSJ) timely filed oppositions, and South Star filed a reply on June 4, 1990. [1]

2. In dismissing South Star's application, the ALJ noted that "South Star has caused significant disruptions in the proceeding, has prejudiced competing applicants, and has essentially contributed toward wasting Commission resources by requiring one delay after another." *MO & O* at para. 11. More specifically, the ALJ adumbrated the following South Star delicts: (1) the late filing of its engineering amendment specifying a new transmitter site; (2) the late filing of its required "Integration and Diversification Statement;" (3) the late published (and improper) "Notice of Publication" concerning commencement of the hearing; (4) the late filing of its opposition to the "Motion to Dismiss" then pending before the ALJ; [2] (5) the defective filing of its late engineering amendment (*i.e.*, South Star's proposed new transmitter site would only provide the requisite signal to 60% of the proposed community of license, and its amendment was not executed by a principal of South Star); and (6) the failure of South Star to produce ordered documents on its pending transmitter site issue by the April 2, 1990 deadline specified in the ALJ's prior *Order*, FCC 90M-614, released March 26, 1990.

3. In addition, South Star's opponents observe that: (1) South Star did not timely file its Appeal before the Board, pursuant to 47 CFR §1.301(c)(2); (2) South Star either late-filed, or incorrectly filed, its required EEO Program Report, tower height amendment, and required change of address; and (3) South Star's improperly executed engineering amendment did not contain the required "site certification," attesting to the "reasonable assurance" of the availability of its proposed new site.

4. *Timeliness of Appeal* : Pursuant to 47 CFR §1.301(c)(2), South Star was required to file its appeal within "5 days after the order is released . . . ." The ALJ's *MO & O* at issue here was released May 2, 1990. However, South Star did not file its "Appeal" until May 14, 1990, claiming it was not required to file earlier because it received the ALJ's *MO & O* via mail and thus, pursuant to 47 CFR §1.4, was allowed "an additional three days" in which to file. South Star is incorrect; its "Appeal" has not been timely filed. 47 CFR §1.4(g) "only applies to the filing of responsive pleadings, and does not apply to appeals filed pursuant to Section 1.301 of the Rules." *See WMID, Inc.*, 15 FCC 2d 295, 297 (Rev. Bd. 1968)(appeal found untimely where filed 8 days after release of order, but considered on merits). While procedurally defective (and subject to immediate dismissal), South Star's Appeal will be addressed in light of the terminal sanction imposed.

5. *Engineering/Tower Site Amendments* : The *Hearing Designation Order*, 4 FCC Rcd 8713, 8715 (1989) (HDO), in this proceeding required South Star to file a corrective amendment with the ALJ concerning its proposed tower height not later than 30 days subsequent to its release date (December 20, 1989). Despite the ALJ's grant of a 14-day extension of time in which to file this compulsory amendment, the ALJ noted that South Star did not respond. However, the ALJ observed that on February 9, 1990, South Star instead requested an additional 30-day period of time to specify a *new* transmitter/antenna site. The ALJ denied this request for an additional 30-day extension, and emphasized that South Star must, *inter alia*, make a "good cause" showing when finally tendering its proposed amendment. *See Order*, FCC 90M-302, released February 16, 1990. A prehearing conference was then convened by the ALJ on February 21, 1990; there, South Star counsel specifically represented that the applicant would submit its engineering amendment proposing a new site within one week (Tr. 11). However, no such amendment was forthcoming until nearly two months later, on April 11, 1990 (and just 12 days before the due date for preliminary exchange of hearing exhibits). The ALJ rejected South Star's new site amendment, observing (*MO & O* at paras. 5-6):

> To justify acceptance of its late filed amendment, South Star must meet the good cause criteria set out in *Erwin O' Connor Broadcasting Co.*, 18 RR 820, 824 (Rev. Bd. 1970) including due diligence. South Star claims that the terrain of the Florida Keys makes finding a transmitter site inordinately difficult. However, South Star has not documented by

affidavit or otherwise its difficulties. It merely provides a footnote reference concerning contacts its principals allegedly made in an effort to secure a new site without revealing whether these contacts have any substance at all. Moreover, South Star's claim of difficulty in finding a site cannot be reconciled with its counsel's statement at the prehearing conference on February 21, 1990 that an engineering amendment would be prepared by the following week. Clearly, on the basis of the facts presented, a finding of diligence cannot be made.

In addition, South Star acknowledges that from its new transmitter site, it would place a signal of 70 dbu intensity over 60% of the community of license and requests a waiver of the Commission's city coverage rule. Because acceptance of South Star's amendment would require the addition of an issue to determine whether such a waiver is warranted, South Star's amendment also fails to satisfy another critical "good cause criteria" referenced to *Erwin O' Connor, supra*. In this connection, a grant of the waiver requested by South Star appears to be inappropriate since the remaining applicants in this proceeding have specified a fully spaced site. Also, as pointed out by CSJ, South Star's engineering amendment is not accompanied by an aknowledgement from the FAA granting approval of the proposed use of the site, thus necessitating the addition of an FAA issue. As noted by the Bureau, South Star's amendment would also require addition of a contingent environmental issue. Moreover, South Star's pleading has failed to demonstrate that its late filed engineering amendment satisfies the foreseeability test of Section 73.3522(b)(1) of the rules. Aside from the deficiencies requiring the rejection of South Star's amendment, it is also noted that the amendment is procedurally defective as it was not proffered in the proper form with a signature of a principal. For all of these reasons, South Star's engineering amendment is rejected.

6. *Failure to Timely File " Integration / Diversification " Statement* : The "Integration and Diversification" statements of the parties were ordered to be exchanged on January 19, 1990. *See Order*, FCC 90M-45, released January 8, 1990. Notwithstanding the filing deadline, South Star did not serve its "Integration and Diversification Statement" on the other parties until February 26, 1990, and did not file this statement with the Commission until April 11, 1990. Thus, the ALJ determined that (*MO & O* at para. 7):

> Assuming *arguendo*, South Star's claim that it was not aware of the due date until on or about February 6, 1990, South Star does not explain why its took 20 days from its admitted receipt of the prehearing order until the service of its integration and diversification statement, nor does South Star explain why it took from February 26, 1990 to April 11 to submit its integration and diversification statement to the Commission. South Star's failure to timely exchange this document with the other parties is in direct violation of the Presiding Judge's prehearing conference Order and clearly prejudices the other parties as South Star was able to review each of the other applicants' proposals before deciding whether to claim integration credit. South Star's gamesmanship cannot be condoned and its late filed integration statement must be rejected.

7. *Failure to Timely and Correctly Publish Local Notice* : South Star was also required to publish, pursuant to 47 CFR §73.3594, a local notice of the commencement of the hearing in this proceeding. The ALJ determined (*MO & O* at para. 8) that:

> South Star has admitted filing its public notice late, but asserts that because it has given the public "sufficient notice as to their opportunity to participate in the hearing", that the notice should be accepted. Contrary to South Star's assertion, the notice is not only late but fails to provide the information that is required pursuant to Section 73.3594 of the rules. As noted by CSJ, the notice lacks significant information required under Section 73.3594 including (1) the applicants that are party to the proceeding, (2) the place of the hearing, (3) the issues in the hearing as listed in the Hearing Designation Order, and (4) a statement that a copy of the application and any amendments are on file for public inspection in the community in which the station is proposed to be located. Under the circumstances, South Star's proffer of its untimely notice of publication must also be rejected.

8. *South Star's Appeal* : In its instant Appeal, South Star argues that its tower height amendment was timely filed, and that its request for extension of time to file a "site amendment" was timely filed on February 2, 1990. [3] However, CSJ observes, "had South Star actually filed the amendment [as claimed] it should have included the document as an attachment to its Appeal . . . . Moreover, the other parties never received [service of] the amendment . . . as is required by Section 1.211 of the Rules." (CSJ Opposition at 3.) Additionally, while conceding that it did not timely file its required "Integration and Diversification Statement," South Star argues only that it "did not . . . receive notice of the integration statement filing requirement," [4] and that, in any event, the "other parties were orally apprised . . . of its integration proposal," but the "delay caused no prejudice to the other parties." With respect to publication of the public notice of hearing, South Star, while conceding improper publication, briefly states (in footnote 9 of its Appeal) that its failure "is a minor problem," and not significant because the other parties did properly publish the required notice. However, South Star *does not even address* the ALJ's specific determination that (*MO & O* at para. 10; emphases added):

> South Star was required to produce documents on the transmitter site issue on or before April 2, 1990. *See Order*, FCC 90M-614, released March 26, 1990. *As of this date, and despite a motion to compel* filed April 4 after no document production took place on the scheduled date, South Star *still has produced no documents in response to the Order of the Presiding Judge*. This provides yet another example of South Star's complete disrespect for the procedures of the Commission and another ground for the applicant's dismissal.

9. *Discussion:* In dismissing South Star's application, the ALJ held (*MO & O* at paras. 10-11):

> South Star's actions throughout this proceeding demonstrates its indifference toward the Commission so much so that its continued involvement cannot be further justified. South Star has failed to observe even the most minimum requirements for prosecuting its application . . . . South Star failed to file its integration and diversification statement as required by the Presiding Judge's prehearing conference order. Also, aside from the fact that the filing of South Star's engineering amendment is inexcusably tardy, the amendment is defective and cannot be granted. The rejection of South Star's engineering amendment means that South Star has no viable transmitter site, providing a separate basis for dismissal of its application. *See Goodlettsville Broadcasting Company, Inc.*, 4 FCC Rcd 8627 (Rev. Bd. 1989).
>
> In addition, as discussed above, South star has failed to timely or properly publish notice of the designation of this proceeding for hearing.
>
> * * *
>
> It is recognized that in determining the dismissal of an application, the Presiding Judge is obligated to provide a proper balance between "the need of the Commission to protect the integrity of its procedures and administrative techniques and the public interest in seeing that its scarce broadcast facilities go to the best qualified applicant." *Warren Price*, 2 FCC Rcd 7409, 7410 (Rev. Bd. 1987) *citing Sco-Kim, Inc.*, 90 FCC 2d 960, 963 (Rev. Bd. 1982). Given South Star's consistent pattern of noncompliance with Commission rules and policy, as documented above, the balance must tilt in favor of dismissal. South Star has caused significant disruptions in the proceeding, has prejudiced the competing applicants and has essentially contributed toward wasting Commission resources by requiring one delay after another. Dismissal of its application is clearly required.

10. In light of the multiple and continuing delicts of South Star, we affirm the ALJ's dismissal of that applicant. The ALJ's action is fully consistent that with court and Commission precedent governing dismissals of applications in comparative hearings. As the Commission recently declared in *Warren Price Communications, Inc.*, FCC 90-175, released May 10, 1990 (at paras. 11-12; footnotes omitted):

> We also reject [the applicant's] argument that it has not delayed the proceeding and that its actions have not been prejudicial to other applicants. Our denial of review was predicated on unacceptable conduct . . . . [The applicant] repeatedly failed to prosecute its application in a timely and expeditious manner. As we held in denying review, "prosecution of an application means timely compliance with procedural and substantive rulings, including ALJ's orders." *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). It was well within the ALJ's discretion to require [the applicant] to adhere to the Commission's rules and his procedural orders in order to continue as a party in this proceeding.
>
> [The applicant] also claims that the ALJ erred in dismissing its application because the ALJ failed to establish that its deficiencies resulted in "material prejudice" to the other parties . . . . This argument is misplaced. Nothing in the FCC's rules requires an ALJ to tolerate all procedural deficiencies in an applicant's conduct that fall short of "material prejudice" to other applicants. The Commission has made clear that the public interest is served by expeditiously resolving comparative application proceedings so that the public can receive service. *See Hillebrand Broadcasting, Inc.*, [*supra*]. The ALJ's discretion to control the conduct of the proceeding before him encompasses the discretion to dismiss the application of a party that burdens a proceeding by repeatedly failing to adhere to the governing procedures.

Further, in upholding the authority of an ALJ to dismiss an applicant, the court has also recently enumerated the factors that should be considered: (1) The applicant's proffered justification for the failure to comply with the presiding officer's order; (2) the prejudice suffered by other parties; (3) the burden placed on the administrative system; and, (4) the need to punish abuse of the system and to deter future misconduct. *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988). The Board has applied these standards in recent cases. *See Carroll, Carroll & Rowland*, 4 FCC Rcd 7149,7151-7152 (Rev. Bd. 1989); *rev. denied*, 5 FCC Rcd 2430 (1990); *V. O. B. Inc.*, 4 FCC Rcd 6753, 6754-6755 (Rev. Bd. 1989); *Mark A. Perry*, 4 FCC Rcd 6500, 6502-6503 (Rev. Bd. 1989); *Mid - Ohio Capitol Communications*, 4 FCC Rcd 8125 (Rev. Bd. 1989), *rev. denied*, FCC 90-209, released June 7, 1990. Here, South Star has repeatedly failed to adhere to specific orders of the ALJ. The prejudice to the remaining applicants has been amply demonstrated by the ALJ, and allowing South Star to reinstate its application would only burden the system and further delay resolution of this proceeding. Indeed, South Star does not address, or attempt to justify, its total failure, *continuing even to this date*, to comply with the ALJ's most recent *Order*, FCC 90M-614, released March 26, 1990, specifically directing South Star to produce documents on its pending transmitter site issue on or before April 2, 1990. When taken together with South Star's admitted failure to timely file its specifically ordered "Integration and Diversification" statement, its admitted failure to timely and correctly adhere to the requirements of 47 CFR §73.3594, and the late and patently defective filing of its engineering amendment, there can be no equitable or legal bases for reversing the ALJ.

11. ACCORDINGLY, IT IS ORDERED, That the late-filed "Appeal as of Right" of South Star Communications, Inc., dated May 14, 1990, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSIONS

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] South Star's "Reply Regarding Appeal as of Right" filed June 4, 1990 is an unauthorized pleading. 47 CFR §1.301(c)(7) prohibits the filing of such replies, unless specifically requested. While the Board has considered South Star's "Reply," we note that many of South Star's problems here could have been, perhaps, alleviated by simple familiarity with the Commission's Rules and Regulations, as is clearly required. *See Classic Vision, Inc.*, 1 FCC Rcd 1109, 1110 n. 1 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 2376 (1987); *Silver Beehive Telephone Co.*, 34 FCC 2d 738 (1977).

[2] While South Star ultimately did file a late opposition pleading, the ALJ noted that "no satisfactory explanation has been provided for its [late] filing . . . ." *MO & O* at para. 9. Nevertheless, the ALJ did consider the merits of South Star's Opposition before issuing his ruling. Id., at n. 2.

[3] Curiously, South Star represents that only *after* the February 21, 1990 prehearing conference (wherein its counsel represented an engineering amendment would be filed within one week) did it learn "that the assurances of site availability upon which it then relied were made without authority." (Appeal at n. 4). If this statement is true, then questions are raised as to South Star's February 9, 1990 attempt to seek a 30-day extension of time in which to file for a new site; that is, why did South Star there represent that it would amend to specify a new site when it allegedly only learned its original site was not available until sometime after February 21, 1990? Further, South Star argues that the ALJ's ultimate rejection of its new site amendment "merely means that South Star must rely upon its original site . . . ." (Appeal at D.) Of course, by South Star's own admission, it has no assurance of the availability of its original site.

[4] An item mailed is presumed to be received by the addressee. *Juan Galiano*, FCC 90R-25, released April 10, 1990; *Denver MDS Company*, 2 FCC Rcd 643 (1987); *see also Lakeland Cablevision, Inc.*, 66 FCC 2d 452 (1977); *Mid-West Video Corp.*, 43 FCC 2d 262 (1973); *El Paso Cablevision, Inc.*, 27 FCC 2d 835 (1971); *Delaware County Cable Television Co.*, 13 FCC 2d 899 (1968).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 11, 1990

Released: June 21, 1990

Mr. John P. Healy
Executive Vice President
Treasure Coast Radio, Inc.
P.O. Box 489
Vero Beach, Florida 32960

re: Station WAVW-FM
Vero Beach, Florida

Dear Mr. Healy:

This refers to the pending application for renewal of license of Station WAVW-FM, Vero Beach, Florida (File No. BRH-881003YR). Review of the station's renewal application and the equal employment opportunity (EEO) record reflects repeated violations of the Commission's Equal Employment Opportunity Rules. Accordingly, pursuant to Section 503 of the Communications Act of 1934, this letter also constitutes a Notice of Apparent Liability for a forfeiture.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

When the renewal application evidences no discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, *see* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b) and (c), the Commission may impose a variety of sanctions/remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that a grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309 (d)(2); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*), *on remand*, 4 FCC Rcd 1254 (1989); *Bilingual-Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for recon. pending*.

Our review of the renewal application and your response to our inquiry reveals no evidence of discrimination but does reveal a record of inadequate EEO efforts. From the time Treasure Coast Radio, Inc. acquired the station in 1985 through the time you filed the renewal application,[1] you had at least 32[2] full-time upper-level hiring opportunities. Your 1989 EEO Program Report (FCC Form 396) lists as recruitment sources the *Fort Pierce News Tribune* and employee referrals. In response to our request for a list of recruitment sources used to attract Black applicants during the period October 1, 1985 through October 1, 1987, you indicate that you also aired announcements of job openings over WAVW-FM, advised AAA Employment (Service) in Ft. Pierce of openings, contacted the Indian River Community College, and placed advertisements in the *Vero Beach Press Journal*. However, our review of the supplemental information and your narrative response indicates that your recruitment sources produced no minority candidates nor were any minority applicants in any of the applicant pools for available upper-level vacancies. Moreover, there is no evidence that you undertook a meaningful self-evaluation of your EEO program as required by the Commission's EEO rules. No minorities were hired for the 32 full-time upper-level positions. [3] Further, since your acquisition in 1985, you have lost the only incumbent minority reported on the full-time, upper-level workforce of Station WAVW-FM.[4]

Your 1989 EEO Program Report also shows that during the 12 month renewal reporting period,[5] you had 12 hiring opportunities. Your response to our inquiry shows that you contacted none of your recruitment sources nor were any applicant pools used to fill upper-level vacancies.[6] Further, from your response it is not entirely clear how many upper-four positions were among the 12 hires. However none of the 12 hires were minorities nor were any minority applicants considered for those vacancies.

We find the EEO record of WAVW-FM similar to but more egregious than that of the licensee in *WROV Broadcasters, Inc.*, 4 FCC Rcd 6157 (1989) (*WROV*), wherein we concluded that the renewal application for Station WROV should be granted for a full term, subject to reporting conditions for three years and issued a Notice of Apparent Liability for Forfeiture in the amount of $5,000. The record in *WROV*, like WAVW-FM, demonstrated inadequate efforts to recruit blacks (the dominant minority) for upper-level positions and to engage in a meaningful self-assessment of its EEO program. However, although the record in *WROV* demonstrated inadequate efforts to recruit blacks for 65 full-time positions (42 upper-level) in a labor market which had a 9.9% Black available labor force, the licensee nevertheless recruited and hired seven blacks (11%) for its workforce over the license term. Further, WROV's minority recruitment sources in the final year of its license term produced 14 minority referrals for eleven hiring opportunities which resulted in one minority hire. Conversely, WAVW-FM's record shows that since acquiring its license in 1985, it has engaged in significantly less efforts (than WROV) to recruit minorities for its 32 upper-level positions in a labor market with a 12.5% Black labor force.[7] In fact the record fails to reflect any minority applicants, contacts with minority organizations, or hires between 1985 and

1987. Since we are considering herein EEO violations which are similar to but more egregious than *WROV*, we believe that a larger monetary forfeiture than that assessed against *WROV* is appropriate. Therefore, we are imposing on WAVW-FM a fine of $10,000 and reporting conditions for a three-year period.

Based on the foregoing, we conclude that you failed to exercise best efforts to comply with the Commission's EEO rules. You did not take meaningful and regular steps to recruit qualified minorities into upper level positions nor did you analyze the station's efforts to recruit, hire, promote and retain qualified minorities. The evidence shows repeated failures to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(3) and (b)(5) and Sections 73.2080 (c)(2) and (c)(5) of the Rules. 47 C.F.R. Section 73.2080. Accordingly, while we find that granting the application will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance as well as issue a Notice of Apparent Liability for Forfeiture in the amount of $10,000.[8] The amount specified was reached after careful consideration of the factors set forth in Section 503(b) (2) of the Communications Act.

Accordingly, *IT IS ORDERED*, that the application of Treasure Coast Radio, Inc. of Vero Beach, Florida for renewal of license *IS GRANTED* subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, Treasure Coast Radio, Inc. is hereby advised of its apparent liability for forfeiture in the amount of $10,000 in light of its repeated failure to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, That the licensee of Station WAVW-FM is directed to submit an original and one copy of the following information on October 1, 1990, October 1, 1991 and October 1, 1992:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted.[9]

(b) a list of employees as of the September 1, 1990 payroll period for the first report and as of the September 1, 1991 and September 1, 1992 payroll periods for the second and third reports by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; sex and race or national origin; and

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Commission records indicate WAVW-FM was acquired by Treasure Coast Radio, Inc. effective July 1, 1985 (BAPLH-850213GY) and filed its renewal application on October 3, 1988 (BRH-881003YR).

[2] The EEO program reported two upper-level hiring opportunities over the 12 month renewal reporting period. The initial response to our inquiry indicated 30 full-time upper-four hiring opportunities during the preceding two years. However, the reply indicated that you did not consider "on-air talent" to be in the upper-four job categories because "they do not have policy input." Subsequently, you filed a supplemental response which indicated that there were an additional 15 upper-four hires, all announcers, during this period but your "records do not indicate whether each announcer hired was a full-time or part-time hire." Therefore, we have not included the 15 additional hires in evaluating your EEO efforts to recruit minorities for full-time upper-level positions.

[3] You point out that a minority was hired during this period but for a full-time "non-upper four job" and was subsequently promoted into an upper-four job.

[4] Employment reports filed by the former licensee in 1984 and 1985 reflect two minorities overall and one in the upper-four job categories.

[5] The 12 month period reported in your EEO program was October 1, 1987 to October 1, 1988.

[6] The General Manager directly hired two females for upper-level vacancies, one a Sales Manager position and one a consultant position.

[7] The 16.2% available minority labor force for Vero Beach, Florida (Indian River County) is comprised of 12.5% Black, 2.1% Hispanic and 1.6% Other minorities. The Annual Employment Reports (FCC Form 395-b) filed for this station generally show an absence of minorities in the station's upper-level workforce. The reports for 1987 and 1988 show one minority, a Black female craftworker in the lower-level categories but an absence of minorities in upper-level positions. The reports for 1985 and 1986 show two minorities overall with one in the upper-four job categories.

[8] In this regard, we are mindful of a pending transaction of Treasure Coast Radio, Inc. to exchange transmitting facilities with Station WCLX (FM), Vero Beach, Florida (BALH-

890629GW and BALH-890629HC); and a subsequent transfer of WAVW-FM to Media VI, a Florida General Partnership (BALH-890629HD). Accordingly, we intend that the forfeiture be assessed on the assignor and that the reporting conditions imposed herein pass with the license to the ultimate assignee. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989).

[9] Such a list might start: 1) News Director: Officials and Managers; full time. 3 applicants: 1 white female, A.W.R.T.; 1 black male, Urban League; 1 black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., NAACP, and Urban League. Selected - black male (03/15/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 29, 1990

Released: June 21, 1990

William N. Dakos, President
Dakos Broadcasting, Inc.
P.O. Box 794
Arcadia, Florida 33821

re: Station WAPG/WOKD(FM)
Arcadia, Florida

Dear Mr. Dakos:

This refers to the pending license renewal applications for Stations WAPG and WOKD(FM), Arcadia, Florida (BR-880923YF and BRH-880923YE). Review of the stations' renewal applications and equal employment opportunity (EEO) record reflects a failure to comply with the Commission's Equal Employment Opportunity Rules.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates a record of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition On Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of the renewal applications and your response to our inquiry reveals no evidence of discrimination but does reveal a record of inadequate EEO efforts. It appears that your minority recruitment sources did not produce minority candidates nor were minority applicants in the applicant pools when there were hiring opportunities. By letter dated February 21, 1989, we requested additional information regarding your EEO efforts over the renewal reporting period and the prior three year period.[1]

Your response indicates that from September 1984 through the time you filed your renewal application in September 1988, you had 31 full-time hiring opportunities.[2] Your response also indicates that "during the period . . . only two Black applicants have applied."

Your 1989 EEO Program Report (FCC Form 396) lists as recruitment sources the *Desoto County Times*; *Charlotte Herald*; Desoto County High School; Charlotte County High School; employee referrals and announcements over your AM/FM facilities. In response to our request for a list of recruitment sources used to attract Black applicants during the period September 1, 1984 through September 1, 1987, you list: the Desoto High School (which has a substantial minority enrollment); the Charlotte High School (which has a substantial minority enrollment); the Christian High School; *The Arcadian* newspaper; *The Gavin Report; Radio and Records*; the *Fort Myers News Press*; *Sarasota Herald*; the Desoto Chamber of Commerce; AAA Employment Agency and the Florida Employment Work Program. Our review of your response and supplemental information [3] indicates that your recruitment sources produced only one minority referral.[4] Moreover, although your minority recruitment efforts were largely unsuccessful, there is no evidence that you undertook a meaningful self-evaluation of your EEO program as required by the Commission's EEO rules.[5] Such evidence would, of course, be considered in mitigation.

Your 1989 EEO Program Report also shows that you hired no minorities for any of the seven job openings that occurred during the 12 month renewal reporting period. Your response to our inquiry indicates that only one minority candidate was among the 61 applicants interviewed for these positions. Further, our review of your employment activities over the extended three year period (September 1984 - September 1987) indicates no minorities (Blacks) were hired for any of the 24 job openings.[6]

We find that the EEO record of WAPG/WOKD(FM) and the overall affirmative action performance under the current licensee is more egregious than the EEO record of the licensee in *Woolfson Broadcasting Corporation of Salisbury / Ocean City, Inc.*, 4 FCC Rcd 6160 (1989) (*WSBY / WQHQ*), in which we granted renewal for a short-term, subject to reporting conditions for three years and a $15,000 forfeiture. The records of both licensees are very similar in their failure to recruit minorities, the failure to employ and hire minorities and the failure to undertake a meaningful self-assessment of their EEO efforts. In addition, both are located in market areas with a substantial available minority labor force (19% in *WSBY / WQHQ*; 21.5% here). However, unlike the situation in *WSBY / WQHQ* which involves a two year record of inadequate EEO efforts,[7] WAPG/WOKD(FM) overall record relates to an entire seven year license term of deficiencies. In these circumstances, we believe that this case warrants stronger sanctions that those imposed in *WSBY / WQHQ*.

Based on the foregoing, we conclude that you failed to exercise best efforts to comply with the Commission's EEO rules. You did not take meaningful and regular steps to recruit qualified minorities, nor did you analyze the stations' efforts to recruit, hire, promote and retain qualified minorities. The evidence shows repeated failures

to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(3) and (b)(5) and Sections 73.2080 (c)(2) and (c)(5) of the Rules, 47 C.F.R. Section 73.2080. Accordingly, while we find that granting the applications will serve the public interest, we also find it appropriate to grant the renewals for less than a full-term with reporting conditions to monitor future performance and to issue a Notice of Apparent Liability for Forfeiture in the amount of $18,000 for past rule violations.

Accordingly, *IT IS ORDERED*, that the applications of Dakos Broadcasting, Inc. of Arcadia, Florida for renewal of licenses of Stations WAPG/WOKD(FM) *ARE GRANTED FOR A SHORT - TERM* ending October 1, 1992 subject to the reporting conditions specified herein.[8]

IT IS FURTHERED ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, Dakos Broadcasting, Inc. is hereby advised of its apparent liability for forfeiture in the amount of $18,000 in light of its repeated failure to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, That the licensee of Stations WAPG/WOKD(FM) is directed to submit an original and one copy of the following information on October 1, 1990, October 1, 1991 and October 1, 1992:

(a) For the October 1, 1990 report, a list of all job vacancies during the twelve months preceding September 1, 1990, and for the October 1, 1991 and October 1, 1992 reports, a list covering the 12 months preceding September 1, 1991 and September 1, 1992, respectively, indicating job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired;[9]

(b) a list of employees as of the September 1, 1990 payroll period for the first report and as of the September 1, 1991 and September 1, 1992 payroll periods for the second and third reports by job title, indicating part-time or full-time status (ranked from the highest to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit minorities for each position filled during the periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, to the supplemental information requested above, you may submit any information you believe relevant with regard to the stations' EEO performance and to your efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The renewal reporting period listed in the EEO program was from September 1, 1987 through August 31, 1988. The prior three year period extended from September 1, 1987 back to September 1, 1984.

[2] The response indicates 38 positions were filled during this period, however, seven of the positions filled were for part-time employees. The response also states of the 31 full-time hiring opportunities, EEO outreach efforts were undertaken on 23 of those occasions and of the eight openings for which EEO efforts were not undertaken, four were filled by promotion, one by a former employee and three by employee referrals or walk-in candidates.

[3] You belatedly supplemented your initial response with two letters from the Desoto County Branch of the NAACP which purportedly support your "ongoing" "efforts to recruit minority employees" during the license term. Our review of the letters indicates that one is limited to a "thank you" note for the stations' support of the Annual NAACP *membership* "Radiothon." While commendable, this type of support is not relevant to the question of the stations' recruitment efforts. The other is devoid of any details or substantiation of its one-line generalization that the stations have engaged in "ongoing employee recruitment efforts." Such substantiation is critical in determining the exact nature of these efforts given that (a) the NAACP was not a recruitment source for the stations at any time during the license term; (b) the letter is dated October 4, 1989, some 12 months *after* the licensee filed its renewal applications and gives no hint as to the nature of the noted "ongoing" recruitment efforts; and (c) the letter is totally unclear as to the onset date and duration of these efforts. In this regard, it should be noted that "post-term" improvements in EEO efforts are *not* properly considered in evaluating license term performance. *See Rust Communications Group, Inc.*, 73 FCC 2d 39, 53-54 (1979).

[4] We note you have submitted no evidence as to having made any special efforts to recruit minority applicants at the above-listed educational institutions identified as having a substantial minority enrollment.

[5] In mitigation you contend that the Commission's estimate of a 21.5% minority labor force in Desoto County (17.5% Black, 3.2% Hispanic, .8% other), overstates the availability of minorities because there is a large migrant labor force in the county. Your support for this contention is a June 1989 newspaper clipping that suggests there may be 9,000 migrants in Desoto County. However, this is of little probative value, since our minority availability analysis was based on 1980 census data and those data do not appear to have included migrant workers. Moreover, there is little reason to believe and no record evidence to suggest, that the migrant labor workforce in Desoto County referenced by you has displaced or otherwise made unavailable the *non - migrant* workforce that the 1980 census indicated was in Desoto County. In this regard, the 1980 labor

force data for Desoto County showed a total of 500 persons in the occupational category which would include migrant workers ("Handlers, Equip. Cleaners, Helpers, Laborers"); 145 of these were minorities. By contrast, the 1980 census data showed a total of 6948 persons in Desoto County in all job categories, 1494 of whom were minorities. Thus, assuming *arguendo* that all minority laborers identified in 1980 were migrants, the percentage of minorities in the overall Desoto County labor force would have changed from 21.5% to 19.8% -- an insignificant difference.

[6] The Annual Employment Reports (FCC Form 395-B) for the seven year license term (1982 - 1988) reflect no full-time minorities in the annual employment profiles for those years.

[7] The licensee of Stations WSBY/WQHQ acquired the stations in 1986, two years prior to expiration of the licenses in October 1988.

[8] In this regard, we are mindful of a conditional assignment of license of both stations from Dakos Broadcasting, Inc. to Gulf Dunes Broadcasting, Inc. We intend that the forfeiture be assessed on the assignor and that the reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989).

[9] Such a list might start: (1) D.J., part-time -- white female, A.W.R.T.; white male, newspaper; black male, Urban League -- selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Dwyer
Broadcasting, Inc.,
Licensee of Stations
WOOJ/WOOJ-FM
Lehigh Acres, Florida

for Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1990; Released: June 21, 1990

By The Commission:

1. The Commission has before it for consideration a Notice of Apparent Liability for forfeiture released August 8, 1989 to Dwyer Broadcasting, Inc., licensee of WOOJ/WOOJ-FM, Lehigh Acres, Florida, *Dwyer Broadcasting, Inc.*, 4 FCC Rcd 6178 (1989) (*WOOJ*) and a letter received August 18, 1989, from Dwyer Broadcasting, Inc. requesting a reduction in forfeiture from $15,000 to $5,000. The Notice of Apparent Liability for $15,000 was issued for repeated failures to comply with the Commission's affirmative action provisions.[1] 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2), (c)(3) and (c)(5).

2. The NAL set out a record of inadequate EEO efforts. Review of the stations' renewal application and inquiry response revealed that the licensee failed to analyze its efforts to recruit, hire, and promote minorities over the period under review. Specifically, the Commission's review disclosed that, although the licensee sent a general recruitment letter that did not mention specific job openings to 45 minority and female recruitment sources on an annual basis, it failed to contact minority referral sources when specific jobs were available. In addition, the review revealed that, even though the recruiting sources contacted yielded no minority referrals and the licensee failed to hire any minorities for 35 vacancies, the licensee did not modify its EEO efforts until the last month of the license term and did not undertake a continual and meaningful self-evaluation of its EEO program as required by the rules. 47 C.F.R. Section 73.2080 (b)(5) and (c)(3).

3. Dwyer Broadcasting responded to the NAL and requested a reduction in the forfeiture to $5,000. In support of its request, the licensee first contends that it did contact minority sources when there were some specific job openings. Maintaining that it periodically sent out letters to 45 recruitment sources, the licensee argues that some of the general letters coincided with "vacancy windows" for five employment positions. The licensee argues that, while the timing of the letters was not deliberate, the letters show that it contacted minority referral sources for specific job vacancies. Next, the licensee contends that it evaluated its EEO program as reflected by its March 22, 1989, amendment of its renewal application. In its amendment, the licensee maintains that it contacted two Black leaders during the license term for advice as to how to attract minority applicants and that it planned to contact additional recruitment sources in the future. Thus, the licensee contends that its record is no worse than that of WROV, *WROV Broadcasters, Inc.*, 4 FCC Rcd 6157 (1989) (*WROV*). Accordingly, it maintains that it should receive the same sanctions as those imposed in *WROV*, reporting conditions and a $5,000 forfeiture.

4. Once a Notice of Apparent Liability for forfeiture has been issued, the respondent is "afforded a reasonable period of time (usually 30 days from the date of the notice)" in which to show in writing why a forfeiture penalty should not be imposed, why it should be reduced or, in the alternative, to pay the forfeiture. Any showing by the respondent to support its request must include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 U.S.C. Section 1.80 (f)(3). The factors that the Commission takes into account when determining the amount of a forfeiture penalty include "the nature, circumstances, extent, and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. Section 1.80 (b)(3).

5. The statement that the licensee submitted in response to the Notice of Apparent Liability does not provide a basis for reducing the forfeiture. The licensee's contention that it contacted minority referral sources for specific positions because some of its annual, general letters coincided with "vacancy windows" for five employment positions is without merit. At best, such coincidental occurrences appear to be nothing more than pure happenstance. In this regard, there is no information before us which suggests that the referenced recruitment sources had any knowledge whatsoever about the existence or nature of the five employment positions relied on by the licensee. Nor is there any information which suggests that the licensee made any efforts to inform recruitment sources about the availability or nature of the five specific vacancies. Moreover, while it is commendable that the licensee of WOOJ contacted two Black leaders for advice in attracting minority applicants, the one contact in 1986 resulted in no referrals and the station did not attempt to contact another community leader until the last month of the license term. *WOOJ*, *supra*, at 6178.

6. Furthermore, contrary to the licensees' contentions, its EEO efforts and that of WROV differ significantly. Although the licensee of WOOJ contacted no minority sources for 35 specific job openings, the licensee of WROV contacted minority sources for seven out of 65 specific job openings. Moreover, WOOJ received one minority referral one month before filing its renewal application whereas the licensee of WROV received 14 minority referrals from sources during the license term. Finally, in addition to the comparative lack of efforts noted above, hiring six minorities out of 65 full-time hiring opportunities connotes that WROV engaged in some EEO efforts, whereas no similar conclusions can be drawn in the case of WOOJ which had no minority hires out of 35 such opportunities. In summary, the overall level of efforts of WROV was more substantial than the level of efforts of WOOJ.

7. Accordingly, *IT IS ORDERED*, pursuant to Section 503 (b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503 (b), that Dwyer Broadcasting Inc., *FORFEIT* to the United States the sum of fifteen thousand

dollars ($15,000) for failing to comply with the Commission's affirmative action provisions. 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2), (c)(3) and (c)(5). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504 (a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504 (a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] WOOJ(AM) changed its call letters to WWCL(AM) on September 14, 1989. WOOJ-FM changed its call letters to WCKT(FM) on September 13, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US AIR FOIA Control No. 89-132

On Request For Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1990; Released: June 21, 1990

By the Commission:

1. Before the Commission is an Application for Review, led by US AIR, seeking review of a ruling by the Chief, Field Operations Bureau (FOB), which denied, in part, US AIR's Freedom of Information Act (FOIA) request. *See* 5 U.S.C. § 552(b). In its initial request, US AIR sought access to Commission documents concerning, *inter alia*, violations by domestic airline carriers of various sections of the Commission's rules and any internal rules, directives or instructions promulgated pursuant to those rulings. US AIR also requested all records concerning direction finding techniques that the Commission uses to identify aircraft sending unauthorized transmissions, including "electronic fingerprinting" techniques.

2. FOB responded to US AIR's request by disclosing many of the documents requested but withholding certain documents and portions of other documents which FOB concluded were exempt from mandatory disclosure under Exemptions 5 and 7 of the FOIA. *See* 5 U.S.C. §§ 552(b)(5), 552(b)(7). The Bureau attached a detailed index identifying each document withheld, in whole or part, and furnished a specific explanation for withholding each document or portion thereof.

3. On appeal, US AIR requests disclosure of the five documents FOB withheld, in whole or part, under Exemption 5, as well as the non-exempt portions of four other documents withheld in their entirety. The Commission has issued a Notice of Apparent Liability to US AIR for violations of various sections of the Commission's rules and, as a consequence, US AIR claims that the documents withheld under Exemption 5 do not properly fall within its scope. US AIR relies upon language in the legislative history of the FOIA indicating that agencies must make available to the public "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency". *See* H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966), *U. S. Code Cong. and Adm. News* 2428. US AIR further claims that FOB failed to establish a nexus between the documents withheld under Exemption 5 and the deliberative process privilege.

4. US AIR's status as a potential litigant before us gives it no priority of access to our records. Under the FOIA, neither the particular identity of the requester nor the intended use of the materials may be taken into account when determining whether a document should be released. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct 1468, 1480 (1989). Exemption 5 protects any document normally privileged in the civil discovery context and shields from disclosure documents whose release could be harmful to an agency's decisionmaking process. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Although in the civil discovery context the "deliberative process" privilege may be overcome by a demonstration of a litigant's need, Exemption 5 protects materials within its ambit regardless of the needs of the requester or the relevance of the agency's records to pending litigation. *See FTC v. Grolier Inc.*, 462 U.S. 19 (1983); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984).

5. The intra-agency memoranda withheld clearly qualify for nondisclosure under the deliberative process privilege of Exemption 5. Each of the memoranda preceded agency decisionmaking and made recommendations or expressed opinions on legal or policy issues concerning investigative matters. *See Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. 1978); *see* also *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Disclosure of any of these documents could harm our decisionmaking process by dampening the frank exchange of staff opinions and confusing the public by the exposure of predecisional agency considerations. *See Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Accordingly, we conclude that the FOB properly withheld each of the documents.

6. We have identified four additional documents which appear relevant to US Air's request. Three of the documents fall within the scope of Exemption 7(E), which protects from mandatory disclosure "records or information compiled for law enforcement purposes . . . [which] would disclose techniques and procedures for law enforcement investigations or prosecutions." *See* 5 U.S.C. § 552(b)(7)(E). Each was prepared by our staff and consists solely of a discussion of techniques and strategy for transmitter identification. These documents will be withheld from public disclosure to avoid release of information which would frustrate our mandate to identify transmitters used for unauthorized or illegal purposes. The remaining document was prepared by a party outside the Government and copies were provided to our staff as a courtesy. This document, a college engineering term paper, broadly discusses transmitter identification and will be disclosed.

7. The reasonably segregable non-exempt portions of the documents which were withheld in their entirety by FOB and the reasonably segregable non-exempt portions of those newly discovered documents not subject to disclosure will be made available for public inspection. *See* 5 U.S.C. § 552(b).

8. Accordingly, for the reasons set forth above, IT IS ORDERED, That the Application for Review filed by US AIR IS GRANTED to the extent indicated herein and is otherwise DENIED. The Requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-301

In re Applications of

ENGLISH COMMUNICATIONS LIMITED PARTNERSHIP (Hereafter "English")	File No. BPH-880606NP
BULL BROADCASTING CORPORATION (Hereafter "Bull")	File No. BPH-880606NQ
MSB BROADCASTING LIMITED PARTNERSHIP (Hereafter "MSB")	File No. BPH-880606OC
SKYWAY COASTAL COMMUNICATIONS (Hereafter "Skyway")	File No. BPH-880606OD
JOSEPH PAPP, III (Hereafter "Papp")	File No. BPH-880606OE
GILCHRIST COMMUNICATIONS, INC. (Hereafter "Gilchrist")	File No. BPH-880606OG
CAPE ROMAIN BROADCASTING, INC. (Hereafter "Cape Romain")	File No. BPH-880606OB [Dismissed Herein]
MCCLELLANVILLE ASSOCIATES (Hereafter "Associates")	File No. BPH-880606OF [Dismissed Herein]

For Construction Permit for a New FM Station; Channel 255C2, 98.9 MHZ in McClellanville, South Carolina

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 25, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On May 7, 1990, Cape Romain filed a request to voluntarily dismiss its application. That request will be granted herein.

3. *Bull.* Exhibit A ("Other Broadcast Interests") of Bull's application indicates that Gardner H. Altman, Jr. ("Altman"), a principal of the applicant, is the 100% owner of AsTraKel which is the 100% owner of KAT Broadcasting, Inc. (KAT). Bull's application reflects that KAT is the licensee of WSVS-AM/FM, Crewe, Va.; WDSC(AM) and WZNS(FM), Dillon, South Carolina; WHCC(AM) and WQNS(FM), Waynesville, North Carolina; and WFLB(AM), Fayetteville, North Carolina. In addition, Commission ownership records indicate that KAT is also the licensee of WETT(AM), Ocean City, Delaware and WWTR(FM), Bethany Beach, Delaware. Both of these stations were acquired by KAT after the instant application was filed. However, Bull has failed to timely amend its application to reflect these acquisitions by one of its principals. Accordingly, an appropriate issue will be specified.

4. Furthermore, while Bull indicates that Altman is the 100% owner of KAT, Commission ownership records indicate that KAT is 100% owned by Mr. Ellek B. Seymour. Accordingly, Bull will be required to file an amendment with the presiding Administrative Law Judge within 30 days of this Order which clarifies this discrepancy and which lists the current broadcast interests of Bull's principals.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Bull has not completed Item 4 correctly. Bull's application gives a post office box number as the residence address for T.M. Mills, Gardner H. Altman, and Terry Suggs. Accordingly, Bull must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Papp.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Papp would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. *Gilchrist.* In response to Section III of FCC Form 301, Gilchrist has indicated that it does not have sufficient funds to construct its proposed facility and to operate it for three months. Accordingly, a financial issue will be specified.

8. *Associates.* On June 1, 1989, Associates filed an engineering amendment to its application. As justification for this late-filed amendment, Associates contends that the Federal Aviation Administration ("F.A.A.") had determined that Associates' original site constituted a hazard to air navigation. Associates also notes that the amendment eliminates the short-spacing which would occur at the original site. Associates thus seeks acceptance of its amendment under the "good cause" provisions of 47 C.F.R. § 73.3522(a)(2).

9. In order for the Commission to accept Associates' June 1, 1989 amendment for good cause, the application must have been acceptable for filing as of the amendment of right date. *See, e.g., Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989). As originally filed, Associates'

application was short-spaced to two applications which had been timely filed during the window for the Socastee, South Carolina allotment (File Nos. BPH-871231MY and BPH-871230MK). Accordingly, Associates requested a waiver of 47 C.F.R. § 73.207. Furthermore, after the close of the amendment as of right period, an applicant cannot file a curative amendment to correct an acceptability defect. To accept amendments after that period would be unfair to the other applicants in this proceeding, all of whom fully complied with our acceptability requirements as of the amendment as of right date. In addition, to allow such perfecting amendments after the above-noted period has lapsed would undermine the streamlined efficient processing procedures adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), to expedite the authorization of new or expanded FM service to the public. The Commission has stated that where no substantial and material question of fact regarding technical feasibility or availability is raised concerning all other applicants' fully-spaced transmitter sites,[2] waivers of 47 C.F.R. § 73.207 will be denied and the short-spaced application will not be designated for hearing with a short- spacing issue against it. *See Donovan Burke*, 104 FCC 2d 843 (1986). Accordingly, Associates' waiver must be denied and the application will be dismissed as unacceptable for filing.

10. *Other Matters*. Engineering analysis of the application of Gilchrist reveals that its proposal is now short-spaced to the proposed assignment of Channel 253A at Pawleys Island, South Carolina (Docket 89-364). At the time that the Gilchrist application was filed, a petition for Rule Making in the Pawleys Island proceeding had not been filed. Consequently, Gilchrist met all the spacing criteria of 47 C.F.R. § 73.207(a) and was accepted for filing. Accordingly, we will designate this applications for hearing. However, the construction permit issued to Gilchrist will be conditioned upon the outcome of the Pawleys Island, South Carolina Channel 253A Rule Making proceeding.

11. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
English	November 22, 1989
Bull	September 6, 1989
MSB	February 14, 1989
Gilchrist	September 20, 1988; March 14, 1989

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Bull violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report changes in the broadcast interests of its principals.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Papp would constitute a hazard to air navigation.

3. To determine with respect to Gilchrist, whether the applicant is financially qualified.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the application filed by Cape Romain IS HEREBY DISMISSED.

16. IT IS FURTHER ORDERED, That Bull shall file the amendments set forth in paragraphs 3 and 4, above with the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That, pursuant to the discussion in paragraphs 8 and 9, above, Associates' request for waiver of 47 C.F.R. § 73.207 IS DENIED, its application IS DISMISSED as unacceptable for filing and its June 1, 1989 amendment IS RETURNED.

18. IT IS FURTHER ORDERED, That in the event that a construction permit is awarded to either Cape Romain or Gilchrist as a result of this proceeding, it will be conditioned upon whatever action is taken in Pawleys Island, South Carolina Channel 253A Rule Making proceeding.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by English, Bull, MSB, and Gilchrist ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The last date for filing amendments as a matter of right in this proceeding was September 9, 1988.

[2] Associates' request for waiver fails to raise any questions of fact regarding the technical feasibility or availability of sites for the McClellanville allocation. *See North Texas Media*, 778 F.2d 28 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-295

In re Applications of

ROANOKE RADIO LIMITED PARTNERSHIP (hereafter "RRLP")	File No. BPH-880601NB
ROANOKE VALLEY BROADCASTERS LIMITED PARTNERSHIP (hereafter "RVBP")	File No. BPH-880602NA
SUSAN D. BROWN (hereafter "Brown")	File No. BPH-880602OJ
PAMELA R. JONES (hereafter "Jones")	File No. BPH-880602OL

For Construction Permit for a
New FM Station on Channel 287A,
Roanoke, Virginia

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 21, 1990.

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Roanoke Valley Telephone Company ("Roanoke Cellular") is the limited partner in RVBP. Mr. Billy J. Parrott, president and sole shareholder in Roanoke Cellular, is also president, director and 47.3% voting shareholder in Private Networks, Inc. ("PNI"). PNI is in turn 51% partner in PN Radio Company; 49% of PN Radio is held by Broadcast Data Corp., a wholly-owned subsidiary of Graphic Scanning Corp.

4. In an action relative to the parent of PNI's partner in PN Radio Company, Graphic Scanning Corp., by Order released August 24, 1982, the Commission designated for hearing applications filed by A.S.D. Answer and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party in interest in the applicants. In an Initial Decision released January 5, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party in interest in the A.S.D., Vineyard. P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission.

5. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion & Order*, released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the *Initial Decision*. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct were to regain control of Graphic. *A. S. D. Answer Service, Inc. et al.*, 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

6. We also note that an affiliate of Broadcast Data Corp.'s parent company, Graphic Scanning Corp., has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.* (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal anti-trust laws. *See e.g., Meridian Communication*, MM Docket No. 87-177, 2 FCC Rcd 3630 (1987). An appropriate condition will therefore be specified below. Finally, a complaint has been filed by the Securities and Exchange Commission in the United States District Court for the Southern District of New York alleging the filing with the SEC of certain false, misleading and untimely statements concerning investment made in Graphic Scanning Corp. by Amster & Co., Arnold Marvin Amster, Barry Stuart Lafer, and Joel R. Packer in 1987. An appropriate condition will be specified below concerning this matter.

7. *RRLP*. RRLP, in its application of June 1, 1988, answered "yes" to Section III's question regarding financial certification. However, on September 7, 1988, during the amendment-as-of-right period, it amended the application to indicate that it was not financially certified. Subsequently, on December 20, 1989, RRLP submitted an amendment to its application to indicate that it has since become financially qualified. No showing of good cause accompanied the amendment. In its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg., 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. Title 47 C.F.R. § 73.3522(a)(6) provides that predesignation amendments addressing the acceptability or grantability of an application filed subsequent to the 30-day amendment-as-of-right period will be considered only upon a showing of good cause. Accordingly, pursuant to § 73.3522(a)(6), RRLP's December 20, 1989 amendment will be returned and an appropriate issue will be specified below.

8. *Site availability*. When RRLP filed an amendment on September 7, 1989, proposing to relocate its transmitter site, the applicant was obligated to file a corresponding certification of reasonable assurance of site availability. This RRLP failed to do. Therefore, an appropriate issue will be specified below.

9. The applicants below have petitioned for leave to amend their respective applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	DATE OF AMENDMENT
Jones	March 14, 1990; March 19, 1990 (2) May 9, 1990
RRLP	January 29, 1989

10. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by RVBP would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. Additionally, the FAA has determined that Jones' proposed antenna will constitute a hazard to air navigation. Accordingly, an issue will be specified against Jones.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine with respect to RRLP, whether the applicant is financially qualified.

2. To determine if RRLP has reasonable assurance that the site proposed as the location of its transmitting antenna will be available to the applicant for the intended purpose.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by RVBP and Jones would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to RVBP as a result of this proceeding, its grant will be without prejudice to: (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A. S. D. Answer Service, Inc. et al.*, CC Docket No. 82-587 *et seq.* ; (iii) *Utah Telecourier v. MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U.S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Jones, RRLP.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-88

In the Matter of

Inquiry into the Existence
of Discrimination in the
Provision of Superstation
and Network Station Programming

FURTHER NOTICE OF INQUIRY

Adopted: May 10, 1990; Released: June 21, 1990

By the Commission:

I. INTRODUCTION

1. On December 29, 1989 the Commission released a report on the extent to which satellite carriers[1] are unlawfully discriminating, within the meaning of Section 119(a)(6) of the Copyright Act, 17 U.S.C. § 119 (a)(6), in providing superstation[2] and network station [3] programming to distributors[4] for private home viewing[5] by satellite dish owners. Our *Report*,[6] which was prepared pursuant to legislative directive,[7] reached the following conclusions:[8]

> (a) Satellite delivered superstation and network station programming is accessible to home earth station users both directly from satellite carriers and through a variety of entities servicing them as distributors;
>
> (b) Based on the evidence in this record, there appears to be no general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors of superstation and network station programming to home earth stations;
>
> (c) Evidence has been submitted indicating that satellite carriers are charging higher rates for programming provided to home dish distributors than rates charged for cable distribution. The record contains little or no information as to the reasons for these differences, making it impossible for us to determine whether the higher rates are just and reasonable. Because this evidence raises serious concerns about the competitive nature of this market, and the impact on consumers, we intend to initiate a further notice of inquiry in order to develop a more complete record on this issue.

This *Further Notice* solicits comments on the issues left unresolved in our *Report*. We intend to prepare a supplemental report to Congress on these issues pursuant to Section 713 of the Communications Act.

2. The record compiled in response to our initial *Notice of Inquiry (First Notice)* [9] was sufficient to allow us to conclude that there is no prevalent pattern of discrimination involving rates charged or programming available to the various distributors to home earth stations. Thus, satellite carriers do not appear to be discriminating among distributors, for example, by offering distributors affiliated with the satellite carrier more preferable rates or terms than those available to non-affiliated distributors. We received only limited information to aid in the comparison of rates charged to distributors vis-a-vis rates charged to cable television system operators.[10] One commenter, the National Rural Telecommunications Cooperative (NRTC), presented evidence demonstrating that satellite carriers are charging significantly higher rates to distributors to home earth station owners than they charge cable television system operators distributing the programming by cable to cable subscribers. The satellite carriers did not address NRTC's allegations, nor does the record otherwise provide sufficient evidence to determine if cost or other factors would justify such disparities.

3. In this *Further Notice*, we address the specific question of whether satellite carriers are unlawfully discriminating against distributors to home earth stations in providing superstation and network station programming in favor of cable television system operators or other video program service providers such as satellite master antenna systems (SMATV) or wireless cable systems. In order to make this determination, we request that commenters address the following questions:

> (a) Are services to distributors and other video programming providers such as cable television system operators "like" for purposes of determining if unlawful discrimination exists?
>
> (b) Do satellite carriers charge higher prices to, or engage in more burdensome practices with, home earth station distributors than cable television system operators or other video service providers for superstation and network station programming?
>
> (c) Are there cost or other factors that justify higher charges or more burdensome practices by satellite carriers with respect to distributors? If so, what are the specific costs involved in serving distributors as compared to the rates charged for programming?
>
> (d) If unlawful -- *i.e.*, unjustified -- discrimination exists, what remedial action should the Commission take and pursuant to what jurisdictional authority?

Commenters are requested to focus on all of these questions and provide as much specificity and documentation with their responses as possible.

II. DISCUSSION

A. Scope of Further Inquiry

4. As was the case with the initial inquiry in this proceeding, our investigation focuses on the statutory mandate contained in the SHVA. Accordingly, we are examining the provision of superstation and network station programming and not other types of satellite delivered programming.[11] Thus, we are not requesting evidence pertaining to programming such as Cable News

Network, HBO, the Disney Channel, or other premium pay channels. In addition, we are examining possible unlawful discrimination against distributors, as those entities are defined in the SHVA, and are not investigating here potential problems of end user earth station owners or other entities that do not distribute programming for private home viewing via satellite reception equipment.

5. With respect to the entities that we are comparing with distributors, we are especially interested in rates charged to cable television system operators for superstation and network station programming because these entities were identified in our initial investigation as receiving preferential treatment. In addition, we are also interested in rates charged to "wireless cable" operators[12] and satellite master antenna systems,[13] who also obtain superstation and network station programming from satellite carriers for distribution to viewers. Commenters are asked to identify any other entities that obtain superstation and network station programming from satellite carriers to resell to end users, and to provide information on rates charged to these entities.

6. Finally, although we received comments from a variety of sources in response to our *First Notice*, it appears that additional entities who did not comment are participating in this market. For example, only one commenter, NRTC, identified itself as a distributor within the SHVA definition. We understand that other entities are operating as distributors; these distributors are urged to file comments. In addition, as was noted in the *Report*, Satellite Broadcast Network, also known as Prime Time 24, J.V. (Prime Time 24), apparently is a satellite carrier that provides network station programming to home earth stations but did not file comments in response to the *First Notice*.[14] We anticipate receiving comments from Prime Time 24 in this portion of our proceeding, and we are directing it to file contracts as described below. In addition, Tele-Communications, Inc. (TCI), in conjunction with a consortium of cable operators and GE Americom, has announced plans to market a new service delivered in the 12/14 GHz frequency band to home earth station users which will include several superstations and pay-per-view channels. According to reports, this service will utilize retail earth station dealers as distributors for both the hardware and the programming. In order to assist us in preparing the most comprehensive report possible, we ask for comments identifying all entities involved in the distribution of superstation and network station programming to home satellite dish users. Moreover, we request that these newly identified participants provide information and opinions on the issues as set out in this *Further Notice*.

B. Evidence of Discrimination

7. In enacting the SHVA, Congress established that unlawful discrimination by a satellite carrier against a distributor in the provision of superstation or network station programming is a violation of the Copyright Act. We believe that the most appropriate way of fulfilling the mandate of Section 713,[15] to determine whether such discrimination exists, is to use the test developed under Section 202(a) of the Communications Act. This test requires a three step analysis, namely, whether the services in question are like services, whether discrimination has occurred, *i.e.*, whether rates, terms or conditions differ, and whether the discrimination is unjust or unreasonable. However, we also request comment on whether this is in fact the most appropriate standard or what criteria should otherwise be applied.

1. Like Services

8. In applying a Section 202 analysis, we must determine as an initial matter if services to earth station distributors and services to cable television system operators, SMATV systems or wireless cable systems are like services. As we stated in the *Report*, the appropriate analysis of whether services are like is based on the "functional equivalency" test which questions whether the services to each customer are different in any material functional respect.[16] Functional equivalency is based largely on customer perception[17] and for purposes of this inquiry, the customers to be compared are satellite earth station distributors and other providers of video programming to end users, including cable system operators.

9. Based on the limited information compiled in the record to date, we tentatively concluded in the *First Report* that these services may be "like". As we stated there, "[t]he satellite carrier offers the same programming in a scrambled format, using the same uplink facilities, transponder capacity, radio frequencies, and receiving technology" to serve earth station distributors and cable operators that receive superstation and network station programming, and any differences in service do not appear to be material functional differences from the customers' perspective.[18]

10. Commenters are asked to address this preliminary conclusion and supply additional information to enable us to make a definite finding. In responding to the *First Notice*, commenters generally focused on the perception of the end user customers, *i.e.*, either the home earth station owners or the cable customers. For purposes of this *Further Notice*, comments should instead address the perception of the distributors or other program purchasers, such as cable operators, who obtain service from satellite carriers, as they are the customers of the satellite carrier.

2. Prices Charged

11. We must next determine whether earth station distributors are charged more for programming than are other providers of such programming. In its comments filed in response to the *First Notice*, NRTC alleged that rates charged by satellite carriers to earth station distributors far exceed rates charged to cable system operators for the same superstation or network station programming. NRTC stated that the figures it used in making its comparison were typical of a small cable television distributor and that, if rates charged to large multiple system operators were compared, the disparities would be much greater. The satellite carriers responding to the *First Notice* did not, for the most part, address this information.

12. We request comments on this apparent disparity in rates charged. Commenters responding to this question should provide documentation, statistics, and contracts to support their allegations. In addition, we are requiring the satellite carriers identified in our *Report* to file a sample of their contracts with cable system operators, wireless cable system operators, and SMATV operators for the provision of superstation and network station programming in order that the record on this issue can be adequately expanded. These carriers are United Video, Inc.

(United),[19] Southern Satellite Systems, Inc. (Southern), Eastern Microwave, Inc. (Eastern), Netlink USA. (Netlink) and Prime Time 24.[20] As with the request in the *First Notice*, in order to reduce the burden on satellite carriers, we are limiting the number of contracts requested. Each carrier should submit the following contracts for each class of customer (*i.e.*, cable operators, wireless cable operators and SMATV operators) identified above: (1) that with the highest per subscriber rate, (2) that with the lowest per subscriber rate and (3) a random sample of at least twenty other contracts with rates in between the highest and the lowest for each category of customer. If there are not twenty contracts in this middle range, carriers should submit all remaining contracts.[21] In addition, in order to supplement the record, and provide a complete picture of this market, we direct TCI and its consortium partners to file contracts, if any, with home earth station retailers or any other distributors for the distribution of superstation or network station programming as part of its new service described in paragraph six. Such contracts should include that with the lowest rate, that with the highest rate, and a random sample of at least twenty contracts in between. The contracts requested in this paragraph shall be submitted to the Commission on or before August 27, 1990 in the same manner as comments filed in this proceeding and may be filed pursuant to a request for confidential treatment.[22] If the record suggests that the contracts submitted do not adequately represent the carriers' superstation and network station services, we will require submission of additional information to supplement our data.

13. In addition to the contracts requested above, we are requiring Netlink and Prime Time 24, entities not identified as satellite carriers in the *First Notice*, to produce contracts with home earth station distributors. This will enable us to make adequate comparisons of all satellite carriers' rates. Therefore, Netlink and Prime Time 24 are directed to file contracts with distributors, including that with the highest per subscriber rate, the lowest per subscriber rate and a random sample of at least twenty other contracts with rates in between the highest and the lowest, as was required of other carriers in the *First Notice*. These submissions may be filed pursuant to a request for confidential treatment.[23]

3. Possible Justification

14. The final step in our analysis as directed by Section 202(a) is to determine if different rates charged for like services constitute unjust or unreasonable discrimination, *i.e.*, are the differences supported by an appropriate justification. It was undisputed by the commenters who responded to the *First Notice* that it is more expensive for satellite carriers to service home dish distributors.[24] However, it is not clear whether the cost of servicing home dish distributors is sufficiently high to justify the wide rate disparities alleged by NRTC. The Commission did not specifically raise this issue in the *First Notice*, and satellite carriers did not provide adequate cost of service information which might justify the higher rates. In response to this *Further Notice*, commenters are asked to itemize and discuss the costs involved in providing superstation and network station programming to earth stations distributors as compared to the cost of providing the same programming to cable system operators, SMATV and wireless cable systems. It is important that information offered on this issue be supported by sufficient documentation to enable us adequately to judge its probative value in determining whether any higher rates to distributors are justified.

15. Similarly, because unlawful discrimination is not limited merely to unjustified cost differentials, but also may take the form of unfair or unduly burdensome practices, commenters are asked to comment on this issue as well. Are practices among satellite carriers and their distributors the same? If not, are different practices more burdensome to distributors to home dish owners for private home viewing than to other distributors, such as cable television systems? Are different practices justified?

C. Remedial Action

16. Finally, we request comments on what remedial action we should take if the record establishes the existence of unlawful discrimination. The legislative history of the SHVA indicates that the Commission may have the authority to enact rules to address unlawful discrimination in this area,[25] although the legislation itself did not specifically provide us with additional authority. Currently, unlawful discrimination by a satellite carrier against a distributor is a violation of the Copyright Act.[26] In cases when the carrier is functioning as a common carrier, such discrimination might be a violation of Section 202 of the Communications Act.[27]

17. As was discussed in the *First Notice*, current Commission regulation of entities operating in this market is dependent on their regulatory status as common carriers or private carriers.[28] We therefore seek comment on the scope of our authority to apply the concept of "unlawful discrimination" to entities that are not common carriers in light of the statutory definition of a satellite carrier in the SHVA and the language in Section 119(a)(6), which addresses a satellite carrier who "unlawfully discriminates against a distributor."[29] We also request commenters to address the question of our jurisdiction to enact rules with respect to discrimination in this area. Additionally, we request that parties endorsing new regulations submit proposed rules for our evaluation.

III. CONCLUSION

18. This *Notice* is designed to solicit a more comprehensive record on the issue of possible unlawful discrimination in the provision of superstation and network station programming by satellite carriers. We welcome comments from all interested parties and especially request the submission of detailed, specific information, documentation, contracts and any proposals for rules.

19. Accordingly, IT IS ORDERED that United Video, Inc., Southern Satellite Systems, Inc., Eastern Microwave, Inc., Netlink USA and Satellite Broadcast Network (Prime Time 24, J.V.) shall file the following contracts for providing superstation and network station programming to cable system operators, wireless cable system operators and SMATV operators: (1) that with the highest per subscriber rate, (2) that with the lowest per subscriber rate and (3) a random sample of at least twenty other contracts with rates in between the highest and the lowest for each category of customer. If there are not twenty contracts in this middle range, carriers should submit all remaining contracts.

20. IT IS FURTHER ORDERED that Tele-Communications, Inc. and its consortium partners are directed to file contracts, if any, with home earth station retailers or any other distributors for the distribution of superstation or network station programming as part of its new service described *supra* in paragraph six. Such contracts should include that with the lowest rate, that with the highest rate, and a random sample of at least twenty contracts in between.

21. IT IS FURTHER ORDERED that Netlink USA and Satellite Broadcast Network (Prime Time 24, J.V.) are to file contracts with distributors to home earth stations, including that with the highest per subscriber rate, the lowest per subscriber rate and a random sample of at least twenty other contracts with rates in between the highest and the lowest, as was required of other carriers in the *First Notice*. The contracts requested in paragraphs 19-21 shall be submitted to the Commission on or before August 27, 1990 in the same manner as comments filed in this proceeding.

22. Authority for issuance of this Notice of Inquiry is contained in Sections 4(i), 303(r), 403 and 713 of the Communications Act of 1934, as amended (47 U.S.C. Sections 154(i), 303(r), 403 and 713).

23. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **August 27, 1990,** and reply comments on or before **September 28, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554 and in the Domestic Facilities Reference Room (Room 6220), 2025 M Street, N.W. Washington, D.C. 20554.

24. For information concerning this proceeding contact Rosalee C. Gorman, Federal Communications Commission, Washington, D.C. 20554, (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A satellite carrier is an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private viewing. 17 U.S.C. § 119(d)(6).

[2] A superstation is a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier. 17 U.S.C. § 119(d)(9).

[3] A network station is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day. It includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station. 17 U.S.C. §§ 119(d)(2), 111(f).

[4] A distributor is an entity that contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities. 17 U.S.C. § 119(d)(1).

[5] Private home viewing is the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission. 17 U.S.C. § 119(d)(3). A primary transmission is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted. 17 U.S.C. §§ 119(d)(4), 111(f). A secondary transmission is the further transmitting of a primary transmission simultaneously with the primary transmission. 17 U.S.C. §§ 119(d)(7), 111(f).

[6] 5 FCC Rcd 523 (1989).

[7] 47 U.S.C. § 713. This section was included in legislation amending the Copyright Act, Satellite Home Viewer Copyright Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat 3935 at 3949 (1988), amending 17 U.S.C. § 101 *et. seq.*

[8] *Report* at para. 6.

[9] 4 FCC Rcd 3883 (1989).

[10] The *First Notice* directed certain satellite carriers to file contracts entered into with distributors to earth stations but did not request contracts for similar programming services entered into with cable operators. None of the satellite carriers responding to the *First Notice* submitted any contracts with cable system operators.

[11] *See* Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 362, (1989) for a more comprehensive study of the market for provision of video programming services to consumers.

[12] Wireless cable systems receive satellite delivered programming and distribute it to their customers using terrestrial microwave frequencies primarily in the Multipoint Distribution Service. Our use of the term wireless cable systems is not intended to suggest that these entities are cable systems for any statutory or regulatory purposes.

[13] Satellite master antenna systems receive satellite delivered programming for distribution in multiple unit dwellings, *see* 47 U.S.C. § 522 (6)(B).

[14] *See Report* at note 44.

[15] 47 U.S.C. § 713.

[16] American Broadcasting Companies, Inc. v. FCC, 663 F.2d 133, 138 (D.C. Cir. 1980). *See also* MCI Telecommunications Corp. v. FCC, 842 F.2d 1296, 1307 (D.C. Cir. 1988).

[17] Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982).

[18] *Report* at para. 63.

[19] In response to the *First Notice*, Superstar Connection (Superstar) filed contracts on behalf of United stating that it is a subsidiary of United and has been assigned the earth station business and contracts of United and Merchandising Productions, Inc. *Report* at para. 20. Although we accepted these representations of Superstar over objections from NRTC, *Report* at note 67, we will carefully evaluate any new information on this subject submitted in response to the *Further Notice*.

[20] Although Prime Time 24 did not participate in the earlier portion of this proceeding, we will require it to submit contracts in order that our further investigation adequately reflects the market involved.

[21] To the extent that the contracts previously submitted no longer represent a carrier's highest and lowest per subscriber rates charged to home earth station distributors or a legitimate random sample of current contracts with such distributors, carriers are directed to supplement the record with current contracts that fit this description.

[22] *See* 47 C.F.R. § 0.459.

[23] *Id.*

[24] *See* discussion in *Report* at paras. 66 and 67.

[25] As stated in the House Committee on Interstate and Foreign Commerce Report:

> Nothing in this Act affects the authority of the Commission to promulgate rules to address such discrimination and, in fact, this legislation amends the Communications Act with a new Section 713 directing the FCC to examine whether and to what extent such discrimination actually occurs. If the Commission finds regulations on discriminating against distributors of superstations and network stations to home earth stations to be necessary and in the public interest, it may establish such rules.

H.R. Rep. No. 100-887, Part 2, 100th Cong. 2d Sess. 22 (1988). The House Committee on the Judiciary took a somewhat different view, however. *See* H.R. Rep. No. 100-887, Part 1, 100th Cong. 2d Sess. 21 (1988) ("the regulatory reach of the FCC over newer [non-common] carriers is somewhat unclear").

[26] 17 U.S.C. § 119(a)(6).

[27] *See First Notice* at paras. 16-20. NRTC filed a complaint with the Copyright Office alleging discrimination by satellite carriers in violation of § 119(a)(6) of the Copyright Act. This was forwarded by the Copyright Office to the FCC. We note that NRTC's complaint alleges a violation of the Copyright Act. We request that commenters address the question of what appropriate action should be taken in response to this complaint.

[28] *Id.*

[29] 17 U.S.C. § 119(a)(6).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

Rev. Dr. Carrie L. Thomas — File No. BPTTL-870702C4

For a Construction Permit for
a Low Power Television Station
Channel 33
Darien, Connecticut

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1990; Released: June 21, 1990

By the Commission:

1. The Commission has before it an Application for Review filed by New Jersey Television Corporation (NJTV) on May 19, 1989, of the action of the staff taken pursuant to delegated authority on April 19, 1989. Therein, the staff denied NJTV's Petition To Deny the application of Rev. Dr. Carrie L. Thomas (Thomas) for a construction permit to build a low power television station on Channel 33 at Darien, Connecticut.

2. In February of 1981, NJTV filed an application for a low power television construction permit for Channel 33, Atlantic Highlands, New Jersey. At that time, the Commission employed a "cut-off list" system for the filing and processing of applications in this service. Under this procedure applications were listed as accepted for filing by public notice, and a thirty-day period for filing competing applications was provided. This system was discontinued in 1984 when the Commission adopted the "filing window" system, whereby applications could only be filed during certain designated periods. *Filing Window I*, 102 FCC 2d 295 (1984).[1] At that time numerous applications, including that of NJTV, had not been placed on a cut-off list under the old procedure. The Commission was aware of this situation, and stated that in order to expedite the processing of pending applications that had not been cut-off, such applications would be cut-off on the last day of the first national filing window. *Id.* at 298. On July 2, 1987, the last day of the first national filing window, Thomas filed an application for Channel 33, Darien, Connecticut. As Thomas' application was mutually exclusive with NJTV's application (as well as several others), they were placed in a lottery held on June 24, 1988. Thomas won that lottery. Thereafter, on July 14, 1988, NJTV filed a Petition To Deny Thomas' application.

3. NJTV claimed that it proposed to serve areas of New Jersey lacking local television service, and therefore the staff should have considered Section 307(b) of the Communications Act in awarding the construction permit.[2] NJTV contended that Section 307(b) mandates consideration of the relative needs of proposed communities for new broadcasting facilities. NJTV also alleged that by not placing its application on a cut-off list and allowing subsequent applicants to apply for the channel during the filing window, the staff's action resulted in the invalid acceptance of Thomas' application. NJTV claimed that, because its application was on file since 1981, it was unfair to allow an applicant applying in 1987 to enter the same lottery for which NJTV had waited six years.

4. In a letter dated April 19, 1989, the staff denied NJTV's petition. The staff responded to NJTV's claim by stating that it was authorized to use lotteries in this service and that, in establishing the service, the Commission concluded that traditional Section 307(b) comparisons were not in the public interest. Similarly, the staff rejected NJTV's claim that Thomas' application was invalidly accepted. The staff stated that in view of the enormous volume of applications on file, it was in the public interest to cease issuing cut-off lists and institute a more efficient procedure for processing the applications. Further, NJTV had failed to challenge the procedure during the Rule Making. As Thomas' application was filed in compliance with the new procedures, it was validly accepted.

5. NJTV maintains in its Application for Review that the staff operated on the mistaken theory that the statute authorizing a lottery procedure for selection of low power television applications rendered consideration of Section 307(b) moot. NJTV contends that, on the contrary, Section 307(b) considerations remain valid and must be entertained, in conjunction with the lottery procedure, when awarding a broadcast license. Therefore, NJTV claims the selection of Thomas' application by lottery must be set aside. We disagree. In the Rule Making establishing the low power television service, the Commission addressed this issue and decided that traditional comparisons of communities would not be made. *Low Power Television Report and Order*, 51 RR 2d 476 (1982). Therein, the Commission noted the difference between full service television and the low power television service. The Commission also noted the fact that low power television is a secondary service, that its stations serve a much smaller area and that they do not have a designated community of license to serve. Moreover, the fill-in nature of the service, coupled with the full service television allotment scheme, would create a situation where traditional Section 307(b) concerns relating to a community of license do not arise. With respect to the distribution of low power television stations, the Commission stated the following:

> [The] existing station distribution pattern, coupled with our requirement that low power stations protect the Grade B contours of all full service stations will result in the vast majority of low power authorizations being granted outside the top 50 markets. Thus, the assignment policies we are adopting for the low power service automatically will accomplish the concern we formerly addressed in our Section 307(b) hearing contests.

Id. at 505.

6. Furthermore, the Commission determined that the regulatory structure of the low power television service rendered the traditional comparative criteria inappropriate to the selection process. The Commission felt that marketplace considerations would ensure that these stations are responsive to audience needs and interests, and that the Commission need not "second guess" licensees by considering traditional comparative criteria, such as programming, full-time participation and Section 307(b)

comparisons. Limiting the comparative criteria to diversification and minority ownership, it was felt, would expedite licensing and service to the public. The Commission stated "we believe that this combination of criteria can further a primary objective for the low power service, facilitating entry by groups and individuals that are new to the broadcast industry." *Id.* at 512.

7. Moreover, before it implemented lottery rules, the Commission, in *Random Selection Lotteries*, 93 FCC 2d at 959, again considered an argument to adopt a middle ground approach with respect to comparative considerations regarding communities of license. It was argued that the Commission could take an initial "hard look" at mutually exclusive applications to determine whether it was possible, based on traditional comparative criteria, to make an immediate public interest judgment on them. In rejecting this position, the Commission reasoned that the minimal public interest benefit that may be obtained from such an approach would be outweighed by the substantial detriments incurred. The detriments would primarily be a delay in introduction of the service and additional cost to the parties involved. *Id.* The cost factor would be particularly burdensome, in view of the fact that many low power television applicants would be individual entrepreneurs lacking substantial amounts of capital. Prospective licensees would have to divert limited resources from providing service to the public to processing their applications. The Commission determined that the public interest was best served by instituting a licensing procedure which required applicants to expend the least amount of resources. Accordingly, the lottery rules were adopted with the preferences limited to diversity and minority ownership considerations. In view of our decisions on this issue, we disagree with NJTV's argument that a need for local television service in that part of New Jersey mandated that the Commission overlook the lottery selection method. The staff was correct in following the rules and setting NJTV's application for lottery without considering the communities' relative need for television service.

8. NJTV also repeats its claim that Thomas' application was accepted for filing long after a cut-off date should have passed. NJTV states that by so accepting Thomas' application six years after NJTV's was filed, the staff undermined NJTV's right to have its application considered with due process. However, since Thomas' application was timely filed pursuant to the filing window rules, it was entitled to participate in the lottery based upon the procedures adopted in the filing window proceeding, *Filing Window I, supra*. While we recognize that NJTV suffered delay, we do not believe that its application was processed unfairly. There was no unfair competitive disadvantage in remaining "uncut-off" until the first national filing window. Because of the Commission's concurrent freeze on the filing of low power television applications, (*Order Imposing Freeze*, 46 FR 2602, May 11, 1981; *Order*, 48 FR 44555, September 29, 1983), no mutually exclusive applications could have been filed against it during this period. Further, NJTV was on notice when it filed that procedures for resolving mutually exclusive applications were not yet in effect. [3] Moreover, while Thomas' application was filed against it when the window opened, NJTV's application was already mutually exclusive with other applications, and would have been subject to and may have attracted additional competing applications had it been placed on a cut-off list. In fact, as Thomas points out, those applications cut-off by the filing window attracted fewer competitors because they were not published on a list. Finally, the delay NJTV encountered is not a legal basis for dismissing Thomas' application. Many other applicants, including many of those placed on the last cut-off list, experienced lengthy delays caused by the extraordinary volume of applications filed in the low power television service.

9. After a careful review of NJTV's arguments, we find that the staff fully considered and properly decided the matter.[4] NJTV's application for review will therefore be denied.

10. Accordingly, IT IS ORDERED That the Application for Review filed on May 19, 1989, by New Jersey Television Corporation, IS HEREBY DENIED.[5]

11. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order should be sent by Certified Mail--Return Receipt Requested to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Since NJTV's application was mutually exclusive with three other applications filed in 1981, it could not be processed to grant. In the *Notice of Proposed Rule Making*, 82 FCC 2d 47 (1980), the Commission directed that all mutually exclusive low power television applications be held in pending status, and explained that only after comparative criteria and procedures were established would mutually exclusive cases be resolved. A lottery method for resolving mutually exclusive cases was adopted on March 31, 1983, *Random Selection Lotteries*, 93 FCC 2d 952, and the first lottery was held on September 29, 1983. Following the issuance of what was to become the Commission's final cut-off list for television translator and low power television applications in 1984, close to 25,000 applications were filed, bringing to almost 40,000, the number of applications on file. It was not possible for the staff to continue processing the extraordinary volume of applications that resulted from the cut-off list procedure. It was the Commission's view that the issuance of further cut-off lists would have led to a bureaucratic impasse.

[2] Section 307(b) requires the Commission to distribute radio frequencies in a fair, efficient and equitable manner among communities.

[3] *See Notice of Proposed Rule Making, infra* note 1 at 78.

[4] We find no merit to NJTV's argument that the staff's involvement in denying the Petition To Deny somehow indicates bias such that it should be disqualified from assisting the Commission with respect to this Application For Review.

[5] Channel 33, in New York, New York, is one of the channels proposed in a Rule Making proceeding to be made available to the private land mobile radio services. *Further Sharing of the UHF Television Band by Private Land Mobile Radio Services*, 101 FCC 2d 852, 866 (1985). Since Thomas' application is predicted to cause interference to the land mobile operations proposed therein, it cannot be granted outright. Pursuant to the procedures adopted in the Rule Making proceeding, Thomas is entitled to submit a minor amendment at this time, and if it eliminates the predicted interference, the construction permit

will be issued. *Id.* at 869. Thomas should submit her amendment within 30 days of this order. If Thomas cannot amend or chooses not to amend, the grant will be held in abeyance until the conclusion of the Rule Making proceeding. At that time, Thomas will be given a chance to amend to meet the adopted land mobile protection standards, if Channel 33 is selected. If her application is still in conflict, it will be dismissed at that time.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC File NO. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING, LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

ORDER

Adopted: June 13, 1990; Released: June 21, 1990

By the Commission:

1. Before the Commission for consideration are a Decision, *WWOR - TV, Inc.*, 4 FCC Rcd 8127 (Rev. Bd. 1989); an Application for Review filed January 25, 1990 by Whitely Communications; and Oppositions filed February 5 and 7, 1990 by WWOR-TV, Inc. and the Mass Media Bureau, respectively. We agree with the Board's decision and it is affirmed.[1]

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed January 25, 1990 by Whitely Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Although this proceeding was held in abeyance pursuant to 47 C.F.R. § 1.245(b)(4) from March 8 to August 2, 1989, pending Commission consideration of Whitely's request to disqualify the ALJ, we agree with the ALJ that Whitely had ample opportunity to comply with his document discovery order (FCC 88M-4015, released November 23, 1988) during the three months prior to March 8, 1989. *See Memorandum Opinion* and *Order*, FCC 89M-2206, released September 6, 1989, at page 11 n.9.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-309

In the Matter of

Amendment of Section 73.202(b),	RM-7097
Table of Allotments,	RM-7310
FM Broadcast Stations.	
(Griffin, Hogansville, and	
Sparta, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 6, 1990; Released: June 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration are two interrelated petitions for rule making. They both require the substitution of Channel 288A for Channel 248A at Hogansville, Georgia. The first petition, filed by Design Media, Inc. ("DMI"), licensee of Station WKEU(FM), Channel 249A, Griffin, Georgia, proposes to substitute Channel 248C3 for Channel 249A and to modify its Class A license to specify the higher class channel. In order to accomplish the upgrade, petitioner has requested that Channel 288A be substituted for vacant but applied for Channel 248A at Hogansville, Georgia, for which four applications are now pending.[1] The second petition, filed by Alexander Mitchell Communications Corporation ("AMCC"), licensee of Station WSKS(FM), Channel 249A, Sparta, Georgia, seeks the substitution of Channel 249C3 for Channel 249A at Sparta, and modification of the license for Station WSKS to specify operation on Channel 249C3. The upgrade at Sparta also requires the substitution of Channel 248C3 for Channel 249A at Griffin, Georgia, and the substitution of Channel 288A for Channel 248A at Hogansville, Georgia. DMI and AMCC each state their willingness to apply for the requested channels, if allotted.

2. Channel 248C3 can be allotted to Griffin, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction 11.0 kilometers (6.9 miles) north[2] in order to avoid a short-spacing to Station WFOX(FM), Channel 246C, Gainesville, Georgia. Likewise, the proposed substitution of Channel 288A for Channel 248A at Hogansville, Georgia, can be accomplished in compliance with the minimum distance separation requirements with a site restriction 8.5 kilometers (5.3 miles) north. [3] Channel 249C3 can be allotted to Sparta, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction 21.1 kilometers (13.1 miles) west,[4] if the channel changes are made at Griffin and Hogansville.

3. We believe the public interest would be served by proposing the substitution of Channel 248C3 for Channel 249A at Griffin, Georgia, and the substitution of Channel 249C3 for Channel 249A at Sparta, Georgia, because both Griffin and Sparta could receive wide coverage area FM channels. To accommodate these proposed allotments, we shall also propose the substitution of Channel 288A for Channel 248A at Hogansville, Georgia. In addition, we propose to modify the license for Stations WKEU(FM), Griffin, Georgia, and WSKS(FM), Sparta, Georgia to specify operation on Channels 248C3 and 249C3, respectively. Pursuant to Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 248C3 at Griffin or Channel 249C3 at Sparta. If the allotment of Channel 288A is made to Hogansville, the applicants for Channel 248A at Hogansville will be permitted to amend their applications and retain cut-off protection.

4. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Griffin, Georgia	249A	248C3
Hogansville, Georgia	248A	288A
Sparta, Georgia	249A, 274A	249C3, 274A

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 248A at Hogansville, Georgia, as follows:

Tharpe Communications, Inc.
P.O. Box 656
Hogansville, GA 30230
(BPH-880531MN)

TFB & Associates Ltd. Partnership
934 Wood Bourne Drive
Atlanta, GA 30310
(BPH-880602NB)

Info-Air, Inc.
838 Cherokee Road
LaGrange, GA 30240
(BPH-880602OP)

Christopher N. Tarkenton
100 Wexford Place
Athens, GA 30606
(BPH-880601MX)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 13, 1990,** and reply comments on or before **August 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

B. Jay Baraff
Lee J. Peltzman
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D.C. 20036
(Attorneys for Design Media, Inc.)

John F. Garziglia
Howard J. Barr
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Attorneys for Alexander Mitchell Communications Corporation)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The applicants for Channel 248A at Hogansville are Christopher N. Tarkenton (BPH-880601MX), Info-Air, Inc. (BPH-880602OP), TFB & Associates Ltd. Partnership (BPH-880602NB), and Tharpe Communications, Inc. (BPH-880531MN).

[2] The coordinates for Griffin are North Latitude 33-20-30 and West Longitude 84-18-00.

[3] The coordinates for Hogansville are North Latitude 33-14-59 and West Longitude 84-54-34.

[4] The coordinates for Sparta are North Latitude 33-19-55 and West Longitude 83-11-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-310

In the Matter of

Amendment of Section 73.202(b), RM-7190
Table of Allotments,
FM Broadcast Stations.
(Tennille, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1990; Released: June 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Michael K. Garner (petitioner), the Commission considers herein a petition for rule making proposing the allotment of Channel 260A to Tennille, Georgia, as that community's first local broadcast service. Petitioner states its intention to apply for the channel, if allotted.

2. An engineering analysis has determined that Channel 260A can be allotted to Tennille without a site restriction. The coordinates for this proposed allotment are North Latitude 32-56-24 and West Longitude 82-48-06.

3. We believe the public interest would be served by proposing the allotment of Channel 260A to Tennille, Georgia, since that community could receive its first local broadcast service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Tennille, Georgia	--	260A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 13, 1990,** and reply comments on or before **August 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael K. Garner
1980 North Akin Drive
Atlanta, Georgia 30345

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-311

In the Matter of

Amendment of Section 73.202(b), RM-7195
Table of Allotments,
FM Broadcast Stations.
(Oak Grove, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1990; Released: June 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Oak Grove Broadcasting ("Petitioner"), the Commission has before it for consideration a petition for rule making seeking the allotment of Channel 283C2 to Oak Grove, Florida, as that community's first local broadcast service. Petitioner states its intention to apply for the channel, if allotted.

2. An engineering analysis reveals that Channel 283C2 can be allotted to Oak Grove in compliance with the Commission's minimum distance separation requirements with a site restriction 10.8 kilometers (6.7 miles) southeast[1] in order to avoid a short-spacing to the proposed allotment of Channel 284C1 to Crestview, Florida.[2]

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies "among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Oak Grove is not listed in the U.S. Census. [3] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Oak Grove is incorporated, or that it has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989); *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989); *Ansley, Alabama*, 46 FR 58688, published December 3, 1981; *Cascade Village, Colorado*, 48 FR 19917, published May 3, 1983; and *Ellwood, California*, 50 FR 13031, published April 2, 1985.

4. In view of the fact that Oak Grove could receive its first local broadcast service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Oak Grove, Florida	--	283C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 13, 1990,** and reply comments on or before **August 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent A. Pepper
Neal J. Friedman
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006
(Attorneys for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 283C2 at petitioner's specified site are North Latitude 29-42-03 and West Longitude 85-15-07.

[2] *See Notice of Proposed Rule Making* in MM Docket No. 90-91, 5 FCC Rcd 1296 (1990).

[3] We note that Oak Grove is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 210 people. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-526

In the Matter of

Amendment of Section 73.202(b),	RM-6974
Table of Allotments,	RM-7014
FM Broadcast Stations.	
(Golconda and Murphysboro, Illinois, and Lutesville, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1990; Released: June 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8264 (1989), seeking comments on two separately filed petitions for rule making. The first petition, filed on behalf of C R Broadcasting, Inc. ("CR"), requests the substitution of Channel 286B1 for Channel 285A at Murphysboro, Illinois, and modification of its license for Station WTAO(FM) to specify the higher class channel. The proposal to upgrade at Murphysboro requires the substitution of Channel 232A for vacant but applied for Channel 286A at Golconda, Illinois, and the substitution of Channel 281A for vacant but applied for Channel 286A at Lutesville, Missouri.[1] The second petition, filed by William L. Moir ("Moir"), seeks the substitution of Channel 232A for vacant but applied for Channel 286A at Golconda, Illinois.[2] CR and Moir filed supporting comments, restating their intentions to apply for the respective channels, if allotted.

2. Channel 286B1 can be allotted to Murphysboro, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7 miles) southeast, in order to avoid a short-spacing to the construction permit site for Station WBVN(FM), Channel 283A at Carrier Mills, Illinois. Channel 232A can be allotted to Golconda, Illinois, in compliance with the Commission's minimum distance separation requirements at the application site with a site restriction of 2.7 kilometers (1.7 miles) north. Channel 281A can be allotted to Lutesville, Missouri, in compliance with the Commission's minimum distance separation requirements. [3]

3. We believe the public interest would be served by the substitutions of Channel 286B1 for Channel 285A at Murphysboro, Illinois, Channel 232A for Channel 286A at Golconda, Illinois, and Channel 281A for Channel 286A at Lutesville, Missouri, because this would enable Murphysboro, Illinois, to receive its first wide coverage area FM service.[4] In addition, the substitution of Channel 232A at Golconda would expedite the initiation of new service to that community since the FAA has issued a "No Hazard" determination for Moir's designated site for that channel. We are also modifying the license of Station WTAO(FM) to specify operation on Channel 286B1 in lieu of Channel 285A at Murphysboro, Illinois, pursuant to the provisions of Section 1.420(g) of the Commission's Rules. Finally, the applicants for Channel 286A at Golconda, Illinois, and for Channel 286A at Lutesville, Missouri, will be permitted to amend their applications to specify operation on their respective channels (Channel 232A and Channel 281A) and retain application filing protection since the channels are of an equivalent class. *See Phillipsburg, Kansas*, 48 FR 10844 (1983).

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 6, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Murphysboro, Illinois	286B1
Golconda, Illinois	232A
Lutesville, Missouri	281A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of C R Broadcasting, Inc. for Station WTAO(FM), Murphysboro, Illinois, IS MODIFIED, to specify operation on Channel 286B1 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicants for Channel 286A at Golconda, Illinois, and Lutesville, Missouri, as follows:

Lutesville Broadcasting, Inc.
P.O. Box 855, Ironwood Dr.
Mayfield, KY 42066
(Applicant for Channel 286A at Lutesville, Missouri)

William L. Moir
11920 Gay Glen
St. Louis, MO 63043
(Applicant for Channel 286A at Golconda, Illinois)

Barbara L. Waite
Venable, Baetjer, Howard
& Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(Counsel for William L. Moir)

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 286A was allotted to Lutesville, Missouri, in MM Docket No. 87-599. *See Report and Order*, 4 FCC Rcd 666 (1989). A filing window opened on March 6, 1989, and closed April 5, 1989. During this period, no applications were filed. On March 6, 1990, Lutesville Broadcasting, Inc., filed a "first come-first served" application (BPH-900306MK) for the channel, pursuant to Section 73.3573(f)(3) of the Commission's Rules.

[2] Moir, who filed a "first come-first served" application (BPH-890315MG) for Channel 286A at Golconda after the filing window closed, seeks the substitution of Channel 232A for Channel 286A at Golconda because of concerns raised by the Federal Aviation Administration (FAA). Specifically, the FAA maintains that any use of Channel 286A in the vicinity of Golconda will cause intermodulation interference to certain FAA facilities and, therefore, has refused to issue a "No Hazard" determination for Channel 286A at Moir's specified application site. However, Moir has submitted documentation from the FAA indicating that the use of Channel 232A in lieu of Channel 286A at Golconda would alleviate this problem and would not be a hazard to air navigation.

[3] The coordinates for Channel 286B1 at Murphysboro, Illinois, are North Latitude 37-40-35 and West Longitude 89-16-32. The coordinates for Channel 232A at Golconda, Illinois, are North Latitude 37-23-32 and West Longitude 88-29-21. The coordinates for Channel 281A at Lutesville, Missouri, are North Latitude 37-19-00 and West Longitude 89-57-30.

[4] Because the petitions which resulted in these allotments were filed prior to October 2, 1989, the licensee at Murphysboro and the applicants at Golconda, Illinois, and Lutesville, Missouri, may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-288

In re Applications of

KATHY L. MCELROY (hereafter "McElroy")	File No. BPH-880629ME
JANET P. BRO (hereafter "Bro")	File No. BPH-880630MC
CHAMPAIGN - URBANA BROADCASTING CORPORATION (hereafter "CUB")	File No. BPH-880630MF
LUCILLE S. BILL (hereafter "Bill")	File No. BPH-880630MO
R. SHERRI STERN (hereafter "Stern")	File No. BPH-880630MR
HOLIDAY BROADCASTING, INC. (hereafter "Holiday")	File No. BPH-880630MV
SPACECOM, INC. (hereafter "SpaceCom")	File No. BPH-880630NB
DOXA, INC. (hereafter "DOXA")	File No. BPH-880630NK
MARIA E. BERNARDI (hereafter "Bernardi")	File No. BPH-880630NM
MENECI, INC. (hereafter "Meneci")	File No. BPH-880630NP
SEBASTOPOL BROADCAST GROUP, INC. (hereafter "Sebastopol")	File No. BPH-880630NR
CHAMPAIGN FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "CFB")	File No. BPH-880630NV

For Construction Permit for a
New FM Station on Channel 262B1 (100.3 MHz)
in Champaign, Illinois

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 25, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *McElroy*. An engineering study reveals a discrepancy between the 100 meters listed for the antenna height above average terrain (HAAT) in Section V-B, Item 7(b)(3) of McElroy's application and the 98.5 meters HAAT calculated from the average of the eight radials listed in Section V-B, Item 19. This discrepancy does not affect the acceptability of McElroy's application since the use of either value for the antenna height above average terrain does not result in any violation of our technical acceptance rules. However, McElroy will be required to file a corrective amendment resolving this discrepancy with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Bill, Sebastopol*. In response to Section III, FCC Form 301, Bill and Sebastopol have indicated that they were not financially qualified to construct and operate the requested facilities for three months without revenue, but added that they will certify as to their financial qualifications by amendments. However, no amendments have been filed certifying their financial qualifications. Accordingly, an appropriate issue will be specified below.

4. *Sebastopol*. In response to Section II, Item 9(a), Sebastopol indicates that it is in violation of the provisions of Section 310 of the Communications Act, as amended, relating to interests of aliens and foreign governments. Accordingly, an appropriate issue will be specified below.

5. *Bro, Bill*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Bro and Bill have filed such statements, they are deficient. Bro and Bill have not listed any specific recruitment sources for minorities. Accordingly, Bro and Bill will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

6. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Bro	December 28, 1988; June 7, 1989; October 6, 1989; March 6, 1990
SpaceCom	November 29, 1988; January 30, 1989; March 13, 1989; April 20, 1989; August 18, 1989; October 10, 1989; November 13, 1989; January 16, 1990; April 30, 1990
DOXA	October 26, 1989
Meneci	May 17, 1989

7. *DOXA*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. DOXA has not completed Item 4 correctly. DOXA's application gives a post office box number as the residence address for Lloyd Chambers, Craig Chambers, James Whitaker, and Edward Chaney. Accordingly, DOXA must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Bro, Holiday, and Meneci would constitute hazards to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Bill and Sebastopol, whether the applicants are financially qualified.

2. To determine whether Sebastopol is controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

3. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Bro, Holiday, and Meneci would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That McElroy shall submit the clarifying amendment requested in paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bro and Bill shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bro, SpaceCom, DOXA and Meneci ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That DOXA shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On February 26, 1990, Benjamin L. Stratemeyer, by his attorney, requested the dismissal of his application, BPH-880630MD, for a construction permit for a new FM station in Champaign, Illinois. The request is in accordance with our requirements governing such matters. Accordingly, the applicant was dismissed by Commission letter dated May 11, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-27

In re Applications of

CUBAN-AMERICAN LIMITED	File No. BPCT-840921KE
MIAMI 35 CORP.	File No. BPCT-840921KF
MIAMI LATINO BROADCASTING CORP.	File No. BPCT-840921KJ
LAMAR COMMUNICATIONS, INC.	File No. BPCT-840921KK
ADIB EDEN, SR.	File No. BPCT-840921KM
CORAL WAY BROADCASTING, LTD.	File No. BPCT-840921KN
SPANISH BROADCASTING CORPORATION	File No. BPCT-840921KP
RANGE COMMUNICATIONS, LIMITED PARTNERSHIP	File No. BPCT-840921KR
GRACE BROADCASTING NETWORK, INC.	File No. BPCT-840921KS
MINORITY BROADCASTING CORPORATION, INC.	File No. BPCT-840921KT
FIRST LATIN WOMEN BROADCASTING, INC.	File No. BPCT-840921KU

For Construction Permit for a New Television Station on Channel 35 Miami, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1990; Released: June 22, 1990

By the Commission:

I. BACKGROUND

1. This proceeding involves eleven (11) mutually exclusive applications for new UHF television facilities at Miami, Florida. The ALJ granted the application of Miami Latino Broadcasting Corp. *Cuban - American Limited*, 85D-76 (Dec. 30, 1985). The Review Board affirmed. *Cuban - American Limited*, 2 FCC Rcd 3264 (June 2, 1987). In particular, the Board affirmed the ALJ's disqualification of Cuban-American, Miami 35, Lamar and Coral Way, because they failed to secure Federal Aeronautical Administration air hazard clearances in a timely manner. The Board disqualified Spanish and Eden because they failed to establish reasonable assurance of the availability of their transmitter sites. The Board granted Miami Latino's application under the standard comparative issue. It fully credited Miami Latino's integration proposal while denigrating the integration proposals of Grace, Minority, Range and First Latin.

2. We will deny the applications for review filed by each of the losing applicants[1] and affirm the grant of Miami Latino's application. However, the following matters warrant further comment: (1) the applicants' argument that the ALJ was unreasonable, inconsistent and arbitrary in establishing and adhering to a schedule for filing air hazard clearances and perfecting site proposals; (2) the Board's denial of credit for Minority's integration proposal; and (3) First Latin's argument that the Board gave disparate treatment to Miami Latino's and First Latin's integration proposals. We will also modify the Board's comparative evaluation to apply the numerical equation for comparing integration proposals adopted in *Omaha TV 15, Inc.*, 4 FCC Rcd 700, 704 ¶ 30 (1989) and to clarify the treatment of other applicants' integration proposals. In all other respects, the applications for review are denied without comment.

II. SITE PROPOSALS

3. *Background:* The hearing designation order for this proceeding was released on February 12, 1985 and published in the Federal Register on February 26, 1985. 50 Fed. Reg. 7827. The ALJ unilaterally extended the date for filing post-designation amendments as of right from March 28, 1985 to April 15, 1985. *Cuban - American Limited*, FCC 85M-797 (Feb. 20, 1985). He further stated that he would accept air hazard clearances up until the close of the record. Tr. at 12. The record was closed on July 18, 1985.

4. This is a multiparty proceeding and the ALJ is commended for his efforts to expedite the proceeding and promptly issue an initial decision. He established a liberal schedule for filing post-designation amendments and air hazard clearances. He advised the applicants that he would adhere to that schedule in order to expedite this proceeding. The applicants had sufficient time to perfect their site proposals. Several of the applicants were able to secure FAA clearances within the time frame allotted by the ALJ. Only those applicants who filed proposals with potential problems and who failed to meet the objections

of the FAA promptly were unable to perfect their proposals in a timely manner and were subjected to the denial of amendments modifying their site proposals. The record establishes that, if they had diligently responded to the FAA's objections, they also could have secured timely clearances. Thus, the ALJ was well within his discretion in establishing and adhering to time limits for perfecting antenna site proposals and in disqualifying the applicants that failed to comply with his rulings.

5. Generally, applicants are not penalized for FAA delays resulting from circumstances beyond their control. *Mark L. Wodlinger*, 2 FCC Rcd 3196 at 3197 ¶ 6 (1987); *Circle L. Inc.*, 101 FCC 2d 617 (Rev. Bd. 1987). We have also previously said that a policy that would in effect require applicants to modify their proposals and specify lower antenna heights in order to obtain a speedy determination from the FAA could result in a less efficient use of the frequency spectrum. However, this observation must be tempered by "our responsibility to provide service to the public in the most efficient, expeditious manner possible." *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶¶ 2 and 3 (1986). "[T]he effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest" and "ALJs must be given broad discretion to regulate the course of multiparty comparative hearings" in order to provide services to the "public in the most efficient expeditious manner possible." *Id.* In this regard, it is clear that we now give greater emphasis to the discretion accorded ALJs in determining appropriate procedures to facilitate the prompt performance of their responsibilities and that applicants have a high burden to justify an exception to the procedural deadlines uniformly applied by the ALJ to all applicants in the proceeding. Consequently, applicants can not be allowed to inordinately delay the processing of applications from applicants who are willing and able to proceed with the prosecution of their applications, while the former wait for FAA clearances because they failed to take reasonable steps to obtain clearances in a timely fashion.

6. *Grace's Antenna:* In spite of the ALJ's strict filing schedule, he accepted an air hazard clearance from Grace based on an amended engineering proposal, after the record was closed. *Harmony Broadcasting Corporation*, FCC 85M-3319 (Admin. L.J. Aug. 27, 1985). The ALJ concluded that Grace established good cause for its amendment under *Erwin O' Conner*, 22 FCC 2d 140 (Rev. Bd. 1970).

7. In order to file an amendment after the time for filing amendments has expired, an applicant:

> must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

Erwin O' Conner, 22 FCC 2d at 143 ¶ 7. Although not all of these factors are relevant in every case, they collectively identify the elements of the good cause showing necessary for acceptance of such an amendment.

8. Grace filed an amendment specifying a new site to meet the air hazard issue on March 28, 1985, prior to the ALJ's deadline for filing amendments as of right. After Grace received a preliminary notice of FAA disapproval on July 8, 1985, it immediately submitted a proposal to the FAA, reducing the height of the proposed antenna by 22 feet. The FAA cleared Grace's modified antenna proposal on July 22, 1985. Grace amended its application to reduce its proposed antenna height and file the FAA clearance on August 12, 1985. Grace asserted that the amendment was unforseeable because FAA respresentatives had previously assured it that its March 28, 1985 proposal would receive clearance.

9. The ALJ found that Grace timely modified its proposal, that the amendment involved only a slight reduction in height and that the change did not affect the parties' joint engineering coverage exhibit. *Harmony Broadcasting Corporation*, FCC 85M-3319 (Admin. L.J. Aug. 27, 1985). Moreover, in view of the FAA assurances, the minor reduction in height and the absence of any notice that its March 28 antenna proposal was unacceptable, the need for the amendment was not foreseeable. Grace's amendment did not unfairly prejudice any of the other applicants or provide any competitive advantage for Grace, because it did not affect the joint engineering exhibit. Grace was able to obtain the FAA clearance before the filing of proposed findings and its amendment did not require further hearings or disrupt the proceeding. Thus, the ALJ properly found good cause for acceptance of Grace's August 12 amendment, even though it was filed after the deadline for filing amendments. In contrast, the ALJ disqualified a number of other applicants because they failed to modify their site proposals and obtain FAA clearances in a timely manner.

10. *Lamar's Antenna Site:* Lamar retained an air traffic expert in 1984 who advised it that the FAA could amend its air space requirements to accommodate Lamar's proposed tower, even though the proposed tower height exceeded FAA standards. In February of 1985, Lamar's expert changed his opinion. He advised it that the FAA was not likely to approve Lamar's tower unless it reduced its antenna height. Lamar did not reduce the antenna height. It did not obtain a new site until April 29, 1985 after the ALJ's deadline for proposing new sites as a matter of right. It cleared the site with its air traffic expert on April 30 and requested leave to amend its application to specify the new site on May 3, 1985. It did not have an FAA clearance. Lamar argues that these facts should establish good cause for its amendment. It asserts that in *Circle L* and *Wodlinger* the Board found that similar FAA delays were good cause for amendments specifying new sites.

11. Lamar has not established good cause for acceptance of its late-filed amendment. Grace obtained a new site prior to the ALJ's deadline and made the necessary good cause showing for its reduced antenna height. Lamar did not respond promptly to the advice of its expert. Then, instead of reducing the height of its proposed antenna, it sought a new site. As a result, it did not propose the new site until after April 15, 1985. The ALJ found that Lamar did not act with due diligence, its proposed change of location was purely voluntary, the problem it sought to cure (i.e., FAA clearance) was foreseeable, its amendment would prejudice the other applicants in light of the joint engineering exhibit based on the applicants' April 15, 1985 site proposals, and it failed to submit coverage fig-

ures sufficient to demonstrate that it would not accrue a comparative advantage from its new proposal. *Harmony Broadcasting Corporation*, FCC 85M-2200 (Admin. L.J. May 21, 1985).

12. As made clear in paragraph 5, *supra*, the general holdings of *Circle L* and *Wodlinger* have been tempered by the need to avoid delay in the provision of new service to the public. Furthermore, Lamar's reliance on those cases is unavailing, in any event, because they are factually distinguishable from the instant situation. In those cases the Commission accepted amendments to enable the applicants to file FAA clearances and resolve qualifying issues. However, in *Circle L*, the amendment was filed prior to the first prehearing conference. 101 FCC 2d at 619. In *Wodlinger* the ALJ had already decided to consider coverage on a contingent basis, and the amendment did not result in a serious disruption of the hearing. 2 FCC Rcd at 3197 ¶ 6. Moreover, in both of those cases, the applicants acted with due diligence and there was no question of undue advantage or prejudice to other applicants. They also proposed lower heights at previously specified sites, and did not seek new sites as Lamar did in this case. 101 FCC 2d at 618-19; 2 FCC Rcd at 3197 ¶ 6. Lamar did not attempt to comply with the ALJ's filing deadlines. Thus, the ALJ properly rejected its amendment proposing a new site.

13. *Miami 35's Antenna Site:* Miami 35 did not hire an air traffic consultant until after the ALJ's April 15 deadline. On May 23, 1985, the consultant advised Miami 35 that its site would not be approved with its current tower height. On June 11, 1985 it filed an amendment reducing the tower height, but provided no evidence that the FAA had cleared the tower. Miami 35 asserts that, because it was never notified by the FAA that its antenna was not in compliance, the need for the proposed amendment was not foreseeable, and there was good cause for an amendment modifying its proposed antenna.

14. Miami 35 delayed hiring an air traffic consultant until after the April 15, 1985 deadline for amendments. If Miami 35 had hired its air traffic consultant in a more timely manner, it could have discovered the defect in its proposal and secured an FAA clearance in time to comply with the ALJ's schedule. More importantly, the ALJ found that grant of Miami 35's belated amendment would have required addition of a city-grade coverage issue. Although Miami 35 now claims that it would cover all but 0.23 percent of Miami and that such a small percentage has no significance, the applicant made no such showing or claim in conjunction with its petition for leave to amend.

15. Under *Erwin O' Conner*, 22 FCC 2d at 143 ¶ 7, Miami 35 has the burden of demonstrating that its amendment will not require additional hearings or otherwise disrupt the proceeding. In this case, the other parties pointed out deficiencies in the engineering showing filed in support of Miami 35's proposed reduction in tower height. Miami 35 did not rebut those contentions in a timely manner. Thus, the ALJ found that a new issue would have to be added to this proceeding, and he properly rejected Miami 35's amendment. Moreover, Miami 35 did not submit evidence of an FAA clearance prior to the release of the initial decision, and its application was properly denied for lack of an FAA clearance.

16. *Coral Way's Antenna Site:* Coral Way initially proposed to construct a 2000 foot antenna. The FAA notified Coral Way on April 4, 1985 that the antenna would have to be reduced to 400 feet to comply with FAA standards. Coral Way Ex. 2. Instead of modifying its proposal, Coral Way asked for further study. On May 10 an FAA representative advised Coral Way that its proposed 2000 foot tower would be an air hazard. Coral Way Ex. 2 at 3. On July 18 the FAA issued a formal determination that Coral Way's proposal was an air hazard. Although Coral Way requested leave to amend its application only five days after the FAA's formal determination, the amendment was entirely foreseeable because of the FAA's preliminary determination and further study. Moreover, Coral Way proposed a new site which undermined the validity of the joint engineering exhibit, and required a reopening of the record. Thus, the ALJ correctly rejected Coral Way's application for leave to amend and denied its application.

17. *Cuban - American's Antenna Site:* On July 8, 1985, Cuban-American received a preliminary report from the FAA that its proposed site would be a hazard to air navigation. Instead of modifying its proposal to meet the FAA's objections, as Grace did, Cuban-American requested a further FAA study. It ultimately obtained FAA clearance on December 13, 1985 but it did not notify the Commission that its site had been approved until January 3, 1986 – five months after the deadline for FAA clearances and four days after the release of the Initial Decision. It asserts that the FAA's ultimate favorable action was newly discovered evidence and that the Review Board should have reopened the record to accept its FAA clearance. *New Continental Broadcasting Co.*, 88 FCC 2d 830, 843 (Rev. Bd. 1981), reconsideration denied, 89 FCC 2d 631 (Rev. Bd. 1982), reopened and remanded on other grounds, 93 FCC 2d 1275 (1983). It argues that there was good cause for accepting its FAA clearance in order to resolve the basic qualifying air hazard issue and that, if found qualified, it would be the best applicant on a comparative basis.

18. The ALJ is not obligated to wait indefinitely for an applicant to obtain an FAA clearance, thereby unfairly delaying the processing of applications filed by fully qualified applicants who are actively prosecuting their applications. Here, Cuban-American could have modified its proposal and obtained a timely FAA clearance. While Cuban-American was vindicated in that the FAA ultimately cleared its proposal, it was not able to obtain clearance until after the hearing was completed and the ALJ issued an initial decision. The ALJ gave Cuban-American notice of the schedule for filing amendments. The delay in obtaining FAA clearance resulted from Cuban-American's election to ignore the ALJ's procedural timetable and its refusal to reduce its antenna height to meet the objections of the FAA. Thus, the ALJ properly denied Cuban-American's application. *See e.g., Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n. 7 (1985) (temporizing with flawed proposals disserves the public interest by inordinately delaying the initiation of new service). Moreover, reopening the record, after the release of the Initial Decision, would prejudice the parties who proceeded in good faith to prosecute their applications in accordance with the ALJ's procedural deadlines.

19. *Circle L* and *Wodlinger* do not require a different result. While the FAA delays in those proceedings justified the acceptance of late filed amendments, those applicants amended their applications with due diligence, and the amendments did not unduly disrupt the expeditious conduct of those proceedings. Here, Cuban-American was not diligent, and the acceptance of of its

amendment will require the reopening of a proceeding that has already gone to a decision by the ALJ. Thus, the amendment was properly rejected and its application was properly denied.

III. MINORITY'S INTEGRATION

20. Minority originally had one class of stock. Thirteen percent of that stock was owned by its integrated shareholders, Josephine Latimore and Orlanda Dumenigo. Minority claims that on November 10, 1984, -- four days before the B cut-off date -- it reorganized its corporate structure, granting Latimore and Dumenigo 100 percent of its voting stock. The non-integrated owners were given non-voting stock. Minority did not amend its articles of incorporation or issue new stock certificates until April, 1985. The Board, in crediting Minority for integration of only thirteen percent of its ownership interests, said that "inchoate ownership arrangements, until finalized, are not enough to confer integration credit." *Cuban - American*, 2 FCC Rcd at 3268 ¶ 18.

21. Commission applicants are not required to establish their integration proposals as a legal certainty. We will credit an integration proposal whenever an applicant provides reasonable assurance that the integration proposal can be effectuated. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662 ¶ 8 (Rev. Bd. 1982). In *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 433-34 (Rev. Bd. 1983), review denied, FCC 84-434 (Sept. 19, 1984), reconsideration denied, 57 RR 2d 1483 (1985), the integration proposal of a partnership was credited even though the partnership agreement was not executed until after the cut-off date for amending the application. Therefore, the failure of Minority's shareholders to execute documents restructuring its corporate ownership, standing alone, is not a sufficient basis for denying integration credit to Minority for its restructured ownership interests.[2]

22. We agree with the Board, however, that Minority failed to establish that it had restructured its ownership as represented. Minority was originally organized by the husbands of Josephine S. Latimore and Orlanda Dumenigo in May 1984. The principals did not make contemporaneous minutes of that May 1984 organizational meeting. When Minority finally drafted minutes for the May 1984 meeting and by-laws, in April 1985, the documents were false and back dated. Range Exs. 19 and 20; Tr. at 3771-72; Exceptions and Brief filed August 4, 1986 by Minority at p. 13; *Cuban - American*, 2 FCC Rcd at 3268 ¶ 18.

23. The minutes of the November 10, 1984 meeting purportedly restructuring Minority's ownership were also inaccurate. Those minutes falsely represented that Mark Krasnow, who originally held voting stock, was present and consented to the exchange of his stock for non-voting stock. Minority Ex. 6; Tr. at 3677, 3787. Krasnow was not at the November 10 meeting. Tr. at 3436. Moreover, it was not shown that he consented to the corporate restructuring. Although Josephine Latimore testified that she told Krasnow about the change in the status of his ownership interest, she had no recollection of when or where she told him. Tr. at 3531. William Latimore -- Josephine Latimore's husband --and Orlanda Dumenigo did not tell Krasnow about the change. Tr. at 3677, 3787. Furthermore, even after talking with William Latimore, Krasnow believed as late as March 6, 1985, that William Latimore retained decision making responsibility for Minority. Minority Ex. 9 (Letter from Krasnow to William Latimore concerning the employment of counsel). Thus, Minority failed to establish that all of its principals agreed to the restructuring and the evidence indicates that the restructuring was not agreed to by all of Minority's original voting stockholders until after the cut-off date for amending its application. In light of this record, Minority has failed to provide reasonable assurance that the proposed restructuring of the organization had been effectuated by the critical cut-off date. Thus, crediting the restructuring would be a prohibited upgrading of Minority's comparative qualifications and Minority can be credited for the integration of at most thirteen percent of its ownership interests.

IV. DISPARATE TREATMENT OF INTEGRATION PROPOSALS

24. The Board awarded First Latin credit for only part-time integration of its sole shareholder, Diana Madero, because of her full-time employment as a vice president of Bay Broadcasting, Inc., the licensee of two television stations in Puerto Rico. In contrast, the Board fully credited Miami Latino for the full-time integration of shareholders Beverly Smith and Jose Molina even though they failed to pledge to terminate their existing full-time employment commitments.

25. Beverly Smith owns 49 percent of Miami Latino's voting stock. In February, 1985, she signed a two year contract to be a talk show host on station WGBS(AM), Miami, Florida. Coral Way, Ex. 8. In May, 1986, Smith terminated the contract with WGBS(AM) and signed a one year agreement to be a talk show host on AM Station WKIS, Orlando, Florida. Petition for Leave to Amend, filed May 28, 1986, by Miami Latino. Asserting that the Commission does not "expect applicants to forsake their livelihood while their applications are pending," that WGBS(AM) was flexible in administering the two-year contract as shown by the amicable termination of the agreement, and that the subsequent contract with WKIS was only for one year, the Board fully credited Smith's integration proposal. 2 FCC Rcd at 3269 ¶ 22. Although Smith never explicitly pledged to terminate her existing employment, the limited duration of her employment contracts is fully compatible with her integration proposal. Thus, Miami Latino is entitled to full-time credit for her integration proposal.

26. Jose Molina owns 51 percent of Miami Latino's voting stock. Molina works 40 hours a week for the State of Florida Public Defender's office, and 20-25 hours a week as a real estate salesman. Tr. at 1554. He also proposes to work full-time as station manager. The Board found that Molina was "slowing down" his social and community activities in order to apply for the station, and that he has totally immersed himself in Miami Latino's activities. It inferred that he will give up his employment and it credited Miami Latino for his integration proposal. 2 FCC Rcd at 3269 ¶¶ 23-24. Molina, however, did not make a commitment to reduce his existing business activities.

27. Madero, First Latin's sole shareholder, is Vice President for Administration of Bay Broadcasting. She has an office in Coral Cables, Florida. First Latin Ex. 4; Tr. at 3844. The initial decision does not address Madero's employment at Bay Broadcasting. *Cuban - American*, FCC 85D-76, ¶ 151 and n. 48. In spite of the fact that her

employment with Bay Broadcasting may be incompatible with her integration proposal, Madero did not make an explicit commitment to terminate her existing employment in the event First Latin is granted a construction permit. First Latin Ex. 3; Tr. at 3858, 3881. The Board gave First Latin credit for only part-time integration. 2 FCC Rcd at 3268-69 ¶¶ 18-19.

28. Applicants have the burden of proof to establish how they will effectuate their integration proposals. The current employment status of an integrated owner is relevant to determine the applicant's ability to effectuate its proposal. *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 ¶ 9 (Rev. Bd. 1987), rev. denied 3 FCC Rcd 4522, 4522 ¶ 3 (1988). The Commission has refused to credit integration proposals involving extended work weeks which are significantly above 40 working hours. *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 ¶¶ 16-18 (Rev. Bd. 1978) (70 hour work week not credited); *Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 ¶ 16 (Rev. Bd. 1985), rev. granted on other grounds, 104 FCC 2d 438 (1986) (80 hour work week not credited).

29. Molina works between 60-65 hours a week at his current employment. Madero is employed full-time at Bay Broadcasting. We agree with First Latin that there is no basis for according disparate treatment to Madero's and Molina's integration proposals. However, neither Madero nor Molina has promised to reduce or terminate their current employment. Thus, neither Miami Latino nor First Latin has shown how these individuals would be able to fulfill their integration proposals and credit for their integration will be denied. *Kennebec Valley Television*, 2 FCC Rcd at 1242 ¶ 9. [3]

30. Credit must also be denied for the integration of Madero and Molina for another reason. The Commission recently developed a numeric equation for weighing the relative merits of part-time and full-time integration proposals using the Herschman-Herfindahl Index (HHI). *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 ¶ 30 (1989). Utilization of the HHI requires an exact determination of the number of hours that each integrated principal will devote to station management. In the instant proceeding there is no record basis for determining the number of hours that Madero or Molina can devote to their stations. In order for the Commission to award credit for their part-time integration it would be necessary to remand this proceeding to determine how many hours they will devote to their stations, which is clearly unwarranted in light of the ultimate outcome of this proceeding. Thus, because the applicants failed to establish how Madero and Molina will fulfill their integration commitments or how many hours they will devote to the station, no credit will be awarded for their integration.

V. FINAL COMPARATIVE INTEGRATION

31. We affirm the findings of the Board with respect to the other comparative factors. Thus, Miami Latino is credited with 49 percent integration; whereas Grace would be credited with at most 33 1/3 percent integration;[4] Minority at most 13 percent integration; and Range[5] and First Latin 0 percent. Applying the new index for comparing integration proposals pursuant to *Omaha TV 15, Inc.*, 4 FCC Rcd at 734 ¶ 30, the following numerical values are attributed to each of the credited integration proposals:

Miami Latino $(100 \times 100/100)^2 \times .49 = 4900$

Grace $(100 \times 100/100)^2 \times .33\ 1/3 = 3300$

Minority $(100 \times 100/100)^2 \times .13 = 1300$

Miami Latino, with a numerical advantage in excess of 1250 over Grace on the new index, is entitled to a clear preference over the other qualified applicants for its superior integration proposal. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 ¶ 18 (1989). When Miami Latino's integration preference is combined with its standing under the diversification and comparative coverage factors, 2 FCC Rcd at 3267 ¶ 15 and 3270 ¶ 28, it is manifest that the public interest will be best served in this proceeding by the grant of Miami Latino's application.[6]

32. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to File Supplement to Application for Review, filed May 19, 1988 by Minority Broadcasting Corporation, Inc. IS GRANTED and that the Supplement to Application for Review filed May 19, 1988 by Minority Broadcasting Corporation, Inc. IS ACCEPTED.

33. IT IS FURTHER ORDERED, That the Application for Review filed August 3, 1987 by First Latin Women Broadcasting, Inc. IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

34. IT IS FURTHER ORDERED, That the Applications for Review filed August 3, 1987 by Cuban-American Limited; Miami 35 Corp.; Lamar Communications, Inc; Adib Eden, Sr.; Coral Way Broadcasting, Ltd; Spanish Broadcasting Corporation; Range Communications, Limited Partnership; Grace Broadcasting Network, Inc; and Minority Broadcasting Corporation, Inc.; ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission are Applications for Review filed August 3, 1987 by Cuban-American Ltd.; Miami 35 Corp.; Lamar Communications, Inc.; Adib Eden, Sr.; Coral Way Broadcasting, Ltd.; Spanish Broadcasting Corporation; Range Communications, Limited Partnership; Grace Broadcasting Network, Inc.; Minority Broadcasting Corporation, Inc.; and First Latin Women Broadcasting, Inc.; an erratum filed August 7, 1987 by Grace; and an Opposition filed August 28, 1987 by Miami Latino. On May 19, 1988, Minority filed a Petition for Leave to File Supplement to Application for Review and a Supplement to Application for Review. Miami Latino filed an Opposition on May 31, 1988. The petition for leave to file supplement will be granted. Minority's supplement discusses the relevancy of *Victory Media, Inc.*, 2 FCC Rcd 2073 (1988), which was released after the period for filing pleadings in this proceeding expired.

[2] In this regard, it should be noted that an applicant filing on the amended FCC Form 301 is required to submit ownership information documenting its business organization at the time the application is filed. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3855-58 ¶¶ 19-38 (1989).

[3] In a number of cases, applicants proposing full-time integration were granted "slight" integration credit for undefined part-time participation, after they failed to establish that they could fulfill their 40 hour per week, full-time proposals. *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5762 ¶ 23 (Rev. Bd. 1988); *Lenninger - Geddes Partnership*, 2 FCC Rcd 3199 ¶¶ 2-3 (Rev. Bd. 1987), rev. denied, 3 FCC Rcd 1181 (1988). In light of the questions raised in this proceeding, we now believe that the better procedure is to deny credit where an applicant fails to establish how it will fulfill its integration proposal and to award part-time credit only when an applicant makes a specific showing demonstrating the particular number of hours that it will be integrated on a part-time basis.

[4] Two of the three individuals proposed to be integrated by Grace have shown no active participation in or knowledge of the applicant's affairs in their current role as directors. *Cuban - American*, FCC 85D-76, ¶¶ 127-136. This circumstance undermines the reliability of their proposals to be meaningfully integrated into management and thus warrants credit for at most only one-third of its ownership. *See Bradley, Hand and Triplett, supra.*

[5] In light of the continuing dominant role in Range's affairs played by its 70 percent "limited" partner, *Cuban - American*, FCC 85D-76, ¶¶ 111-114, Range is entitled to no integration credit. *See* KIST Corp., 102 FCC 2d 288, 292 ¶ 9 (1985).

[6] Our disposition of this case should not be construed as giving any indication of what determination will be made with respect to the questions concerning the "An ax" Doctrine, raised in our recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd _____ (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1990

INFORMATION REQUIRED TO BE SUBMITTED IN AN APPLICATION TO CONSTRUCT AND OPERATE AN AIR-GROUND TELEPHONE SERVICE

General Docket No. 88-96

This public notice is being issued as a supplement to the *Report and Order* in General Docket No. 88-96. Information contained herein and in the *Report and Order* is to be used to prepare applications to construct and operate an air-ground radiotelephone service in the 849-851/894-896 MHz bands. These applications should be filed on FCC Form 401, be accompanied by FCC Form 155, and be submitted on or before October 15, 1990, to: Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, Pennsylvania 15251-5130. Applications must also be accompanied by a filing fee of $230, the amount required for Code CMD public land mobile service applications.

Applications will be required to meet all pertinent standards of Part 22 of the Commission's Rules and of the international Radio Regulations. In addition, each applicant must supply the following information:

A. WRITTEN AGREEMENT

A signed agreement between the applicant and at least one airline or airline organization, authorizing the applicant to provide air-ground service on its aircraft. By airline organization, we mean an organization (firm, association, or other group) that operates aircraft used by businesses, such as private corporate jets. Any applicant proposing to serve only airline organizations must indicate how many aircraft will be served and demonstrate their need for nationwide service. We will look closely at any application that proposes to serve only a relatively small number of aircraft, generally less than 50, or to serve one or more corporations that require service only in a limited region of the country.

B. FINANCIAL QUALIFICATIONS

A demonstration of either a firm financial commitment or available internal financial resources necessary to construct all proposed ground stations and operate for one year after initiation of nationwide air-ground service.

The demonstration of commitment must include, and be sufficient to cover, the realistic and prudent estimated costs of construction of the 50 required ground stations, as well as any additional ground stations proposed by the applicant, and the cost of their operation and any other initial expenses for one year after initiation of nationwide air-ground service. The estimated construction costs, operation costs, and other initial expenses must be itemized.

The firm financial commitment required above shall be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier, and shall contain a statement that the lender:

(1) has examined the financial condition of the applicant, including audited financial statements, and has determined that the applicant is creditworthy;

(2) that the lender is committed to providing a sum certain to the particular applicant;

(3) that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and

(4) that the commitment is not in any way guaranteed by any entity other than the applicant.

Applicants intending to rely on personal or internal resources must submit:

(i) audited financial statements, certified within one year of the date of the application, indicating the availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year.

(A) The auditors must be certified public accountants.

(B) Net liquid assets is considered to be the excess of current assets (readily converted to cash) over current liabilities. In order to demonstrate ready convertibility into cash, the identity, liquidity, and value of listed assets must be demonstrated. Non-liquid assets can be relied on if the marketability of those assets is documented.

(ii) an audited balance sheet current within 60 days of filing, which clearly shows the continued availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year after nationwide service begins.

NOTE: To ensure the confidentiality of financial information to the maximum extent possible, all such information submitted that is not essential to our public interest determinations shall be available only to selected staff of the Commission.

C. SERVICE PLAN

A service plan containing:

(1) a map or other description of the planned geographic coverage area, including air space over the continental United States, Alaska, Hawaii, and other United States territories.

(2) a schedule for construction of 25 ground stations within three years and of at least 50 ground stations and the commencement of nationwide service to the public within five years from the grant of the initial authorization.

NOTE: 25 ground stations must be constructed before an air-ground system will be permitted to become operational. Failure to construct 25 sites within three years or failure to provide nationwide service through 50 sites within five years would lead to automatic forfeiture of the authorization.

(3) a projection of the system capacity, expressed in terms of the maximum number of calls per hour in each area.

D. TECHNICAL EXHIBIT

A technical description of the proposed system, demonstrating compliance with all applicable technical requirements and describing how the proposed system would operate, if authorized. This exhibit must provide the following information:

(1) the number of ground stations to be used, their locations, and the type and quantity of equipment proposed for the system;

(2) a complete description of the procedures and data protocols to be used on the control channel;

(3) the modulation types to be used and their spectral characteristics;

(4) the effective radiated power and transmitter peak envelope power for all transmitters at each ground station location, and the effective radiated power of the airborne mobile stations;

(5) antenna information as follows:

(i) for airborne mobile stations, the antenna type(s) to be used;

(ii) for ground stations, vertical and horizontal radiation patterns, antenna heights above ground level, antenna support structure heights above ground level, ground elevation above mean sea level, and any relevant information (*e.g.* FAA approval) that may be helpful in determining whether ground station antennas require marking and lighting;

(6) analytical data, including calculations, of potential interference within and without the spectrum proposed to be used for the air-ground system;

(7) an Environmental Assessment, if required. *See* Section 1.1301 *et seq.* of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 17, 1990

Released: May 31, 1990

Massachusetts Channel 46 Corporation 8940-SH
c/o James L. Winston, Esq.
Rubin, Winston & Diericks
1730 M Street, N. W., Suite 412
Washington, D. C. 20036

Rogue Television Corporation
c/o E. William Henry, Esq.
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

Gentlemen:

This refers to your unopposed application (BALCT-900124KG) for consent to the assignment of license of television station WHRC. Norwell, Massachusetts (Channel 46, independent), from Massachusetts Channel 46 Corporation to Rogue Television Corporation (Rogue). Stephen M. Mindich, the sole shareholder of Rogue, is also sole shareholder of MCC Broadcasting Company, Inc., licensee of WFNX(FM), Lynn, Massachusetts. Norwell and Lynn, Massachusetts are both located in the Boston ADI television market. The Grade A contour of station WHRC totally encompasses the community of Lynn, Massachusetts. Section 73.3555(b) of the Commission's Rules generally provides that television/radio combinations cannot be created where the Grade A contour of the television station encompasses the city of license of the radio station. Accordingly, Rogue has requested a waiver of the rule. In support of its waiver request, Rogue correctly notes that Arbitron ranks Boston as the 6th largest market. Rogue has also established that there will be substantially more than 30 separately owned, operated, and controlled broadcast voices in that market after the proposed purchase.

In *Amendment of Section 73. 3555*, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989), we set out standards for reviewing requests for waiver of the rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more separately owned, operated, and controlled voices would remain after the proposed combination. 4 FCC Rcd at 1751. Because Boston is the 6th largest market, and because there will be more than 30 separate voices in the market after the proposed assignment, Rogue meets this standard.

Accordingly, its request for waiver of Section 73.3555(b) is granted. We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the application (BALCT-900124KG) IS GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Tariff F.C.C. No. 68 — Transmittal No. 1963

ORDER

Adopted: June 12, 1990; Released: June 13, 1990

By the Chief, Common Carrier Bureau:

1. On March 16, 1990, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 1963 to establish individual case basis (ICB) rates for "dark fiber" services between customer premises for Central States Microwave Transmission Company (CSMT). Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 1963, to which SWB replied. Transmittal 1963 is scheduled to become effective June 14, 1990.

2. Transmittal 1963 establishes an ICB rate for a 565 megabit per second (Mbps) "dark fiber" service, with protection, between CSMT's premises in St. Louis, Missouri. SWB states that CSMT provides the optical to electrical conversion equipment on its premises. SWB states that the contract period for the service is five years (60 months), and that early termination of service will require the customer to pay all remaining payments minus SWB's interstate special access authorized rate of return at the time of termination. *See* Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Original Page 206.209.

3. MFS asserts that the cost support provided by SWB shows only aggregated numbers for investment and costs and the proposed monthly rate for services. MFS Petition at 2. The cost data, contends MFS, is insufficient and violates Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. MFS argues that the description of services proposed by Transmittal 1963 is inadequate to determine whether the services are actually dark fiber, as SWB claims. MFS submits that Transmittal 1963 implies that SWB's services are not dark fiber because it describes the services in terms of transmission speed and does not state whether SWB or the customer will provide the electronics at either end of the fiber. *Id.* at 2-3. Therefore, MFS concludes, it appears as if SWB's proposed services violate the Commission's *ICB Order*.[1]

4. SWB replies that the services proposed in Transmittal 1963 are similar to other tariffs it has filed, which offer ICB services and which are currently effective.[2] SWB maintains that the cost support it submitted with Transmittal 1963 is provided in the same format as the cost support it filed with its currently effective ICB offerings. SWB Reply at 3. SWB contends that its cost support is a product of a fully allocated cost study, and since the information provided is for an ICB service a demand forecast is irrelevant. *Id.* at 4. Moreover, SWB states that its annual filing shows that all of its special access rates are set so that the category earns SWB's authorized rate of return. *Id.*

5. Contrary to MFS's assertion, SWB argues that the services it proposes in Transmittal 1963 qualify as dark fiber services. *Id.* According to SWB, since it does not provide optical to electrical conversion at either end of the fiber optic link, the offering made in Transmittal 1963 is dark fiber and is correctly priced on an ICB basis. *Id.* at 6.

6. The Common Carrier Bureau has reviewed Transmittal 1963, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by Southwestern Bell are patently unlawful so as to require rejection or that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1963, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989).

[2] SWB Reply at 2 (citing SWB Tr. No. 1777, filed Feb. 13, 1989, Tr. No. 1676, filed July 15, 1988, Tr. No. 1825, filed July 21, 1989, and Tr. No. 1921, filed Jan. 8, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company
Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 2268 and 2275

ORDER

Adopted: June 13, 1990; Released: June 14, 1990

By the Chief, Common Carrier Bureau:

1. Transmittals 2268 and 2275 introduce Virtual Telecommunications Network Service (VTNS) Options 45 and 46, respectively, by which American Telephone and Telegraph Company (AT&T) will provide voice and data communications service between stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for these options are stabilized throughout a five-year term. Transmittal 2268 Description and Justification (D&J) at 4; Transmittal 2275 D&J at 4.

2. The basic charge for VTNS under Option 45 is $59,516 per month; under Option 46, the basic charge is $149,781. Option 46 contains a promotional discount of $107,861 per month for a six-month period following the initial service date. Transmittal 2268 D&J at 5; Transmittal 2275 D&J at 5. Both transmittals are scheduled to become effective June 17, 1990.

3. On May 18, 1990, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate the instant transmittals. AT&T filed a reply on May 30, 1990.

4. Sprint argues that AT&T failed to demonstrate that Options 45 and 46 are integrated service packages that are "unlike" its other component services. Moreover, Sprint contends, AT&T's proposal of 49 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Noting that AT&T filed a standard set of rates for the international satellite, data, and voice transmission capabilities in Transmittal 2220, Option 40, and that these Tariff 12 offerings in general have similar rate structures, Sprint contends that the Commission should order AT&T to offer these rates under a generally available tariff, as it did in the case of the individual case basis (ICB) rates for the local exchange carriers' DS3 service. *Id.* at 2-4. Sprint also alleges that AT&T's cost support for Options 45 and 46 is "seriously deficient" and incorporates by reference its arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 4.

5. AT&T argues that the Communications Act prohibits discrimination only between "like" services, and that the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. Therefore, AT&T asserts, the rates in Options 45 and 46 are not unjustly discriminatory. Reply at 3. AT&T also states that the Commission has consistently found AT&T's standard, Commission-sanctioned cost development systems sufficient to support AT&T's Tariff 12 filings. These methods, contend AT&T, satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 7-8.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2268 and 2275, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2268 and 2275, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 1741

Petition for Waiver of Section 69.4(b) of the Commission's Rules

Revisions to Tariff F.C.C. No. 68

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1990; Released: June 15, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. Southwestern Bell filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), which describes the access service rate elements the carriers must charge. Specifically, Southwestern Bell seeks a waiver to establish a new switched rate element for a new electronic directory assistance service which it calls DirectLine Custom (DLC) service. Southwestern Bell Petition for Waiver at 1. DLC would provide access to a database which customers can use to obtain telephone numbers and addresses of telephone subscribers in Southwestern Bell's service area by entering their names. Southwestern Bell maintains that the information available through DLC is the same as that available through operator directory assistance. Southwestern Bell also filed Transmittal No. 1741 to offer the DLC service. Southwestern Bell originally intended to charge 13 cents per screen, but later revised its charge to 9.3 cents per screen.[1] Transmittal No. 1741 is scheduled to become effective June 16, 1990.

II. PLEADINGS

2. ALC Communications Corporation (ALC) filed a petition to suspend and investigate Transmittal 1741. ALC alleges that Southwestern Bell's cost support data does not disclose the effects of DLC service on its earnings from other services in violation of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. ALC Petition at 2. ALC also claims that DLC will be available only to end users, not access customers. ALC asserts that this is discriminatory, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). *Id.* at 3. Finally, ALC notes that Southwestern Bell has not specified the number of listings to be provided in each screen or explained why subscribers will not be able to obtain numbers in their own Numbering Plan Areas (NPAs). ALC contends these tariff revisions violate Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2, which prohibits vague tariff language. *Id.* at 3-4.

3. Southwestern Bell maintains that its cost support data complies with Section 61.38 of the Commission's Rules, and that DLC will be available to access customers. Southwestern Bell Reply to ALC at 2-4. Southwestern Bell also contends that its tariff language is not vague. It notes that each screen will contain a maximum of eleven lines of information, but the number of listings will vary. *Id.* at 4-5. Finally, Southwestern Bell claims that it will offer another electronic directory assistance (EDA) service with access to numbers in subscribers' own NPAs. *Id.* at 5-6.

4. On February 27, 1990, the Common Carrier Bureau (Bureau) released a public notice inviting comment on the transmittal. The Bureau noted that all pleadings relating to the DLC service assume that DLC is a basic rather than an enhanced service for purposes of Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a), which established the basic-enhanced dichotomy for purposes of distinguishing regulated from unregulated services, but do not describe the reasons for that conclusion. The Bureau invited supplemental comments on that question. *See* Public Notice No. 90-281, released February 27, 1990.

5. Southwestern Bell filed supplemental comments explaining its reasons for concluding that DLC will be a basic service. Six exchange carriers[2] and two interexchange carriers (ICs) [3] filed comments supporting that conclusion. The Computer Software and Services Industry Association, Inc. (ADAPSO) and Compuserve, Inc. (Compuserve) filed comments contending that DLC service would be an enhanced service. Ten replies were filed.[4]

6. The parties arguing that DLC is a basic service cite the *NATA Centrex Order*,[5] in which the Commission found that some services that fit within the literal definition of enhanced services should be treated as basic if the services "facilitat[e] establishment of a transmission path over which a telephone call may be completed." 101 FCC 2d at 360. The Commission described these services as "adjunct to basic." Several parties note that the Commission described electronic directory assistance as an example of an "adjunct to basic service." *Id.* (*cited in* NYNEX Comments at 3-4; AT&T Comments at 2-4; Ameritech Comments at 2; BellSouth Comments at 1; PacTel Comments at 1-3; Cincinnati Bell Comments at 3-4; Southwestern Bell Comments at 2-3).

7. ADAPSO and Compuserve note that DLC fits within the literal definition of enhanced service. ADAPSO Comments at 1; Compuserve Comments at 4-5. Those parties also maintain that DLC should not be classified as adjunct to basic because the reference to electronic directory assistance in the *NATA Centrex Order* is dicta. ADAPSO Comments at 6; Compuserve Comments at 6-7. Compuserve alleges that DLC can be used to generate mailing lists, and therefore does more than merely supply information necessary to complete telephone calls. Compuserve Comments at 7-10. ADAPSO and Compuserve contend that tariffing DLC will blur the line between basic and enhanced services. ADAPSO Comments at 9-10; Compuserve Comments at 12-13. These two commenters allege that tariffing DLC will have an anticompetitive effect because classification as a basic service could lead to cross-subsidization. ADAPSO Comments at 12-13; Compuserve Comments at 11. ADAPSO also claims tariffing DLC will enable Southwestern Bell to cross-subsidize the service. ADAPSO Comments at 11-12.

Finally, if we decide that DLC is basic, ADAPSO urges us to limit our decision to DLC and not consider other electronic directory assistance services with "reverse search" capabilities.[6] ADAPSO Comments at 13-14.

8. The parties arguing that DLC is a basic service characterize ADAPSO's and Compuserve's discussion of the *NATA Centrex Order* as an untimely attack. NYNEX Comments at 4; Bell Atlantic Comments at 1-2. Several parties state that the information available through DLC is the same as that available from a directory assistance operator and argue that the regulatory treatment of DLC should not be different from the treatment of traditional directory assistance.[7] AT&T Comments at 2; Cincinnati Bell Comments at 1-2; Bell Atlantic Comments at 2-3; Southwestern Bell Comments at 4-5; MCI Comments at 1-4. Such parties note that DLC users would not be able to make additions, subtractions or revisions to the information in the database. AT&T Comments at 2; Ameritech Comments at 1-2; BellSouth Comments at 3-4; Cincinnati Bell Comments at 2. Southwestern Bell also notes that DLC does not act on the format, code, or protocol of the transmitted information. Southwestern Bell Comments at 6-7. Finally, PacTel argues that addresses assist users in completing calls by helping to confirm that the user has the number of the correct party and, therefore, the provision of addresses also falls within the definition of "adjunct to basic." PacTel Comments at 4.

9. Only Dun and Bradstreet filed a reply supporting a finding that DLC is an enhanced service. Dun and Bradstreet contends that electronic directory assistance has developed into a competitive market and Southwestern Bell's control of subscriber lists gives it a competitive advantage in that market. *Id.* at 3-4. Finally, Dun and Bradstreet and MCI advocate regulating DLC as a "by-product" of local exchange service. *Id.* at 5-6; MCI Reply at 1-2.

10. Southwestern Bell reiterates that the *NATA Centrex Order* compels the Bureau to find DLC to be an adjunct to basic service. Southwestern Bell Reply at 4. Ameritech and Southwestern Bell also note that the Commission reconsidered and confirmed the *NATA Centrex Order* in 1988. *Id.* at 5; Ameritech Reply at 4. The parties supporting a basic or adjunct to basic finding consider ADAPSO's and Compuserve's "dicta" argument to be irrelevant, because they contend that DLC would fall under the definition of "adjunct to basic" regardless of whether the Commission used EDA as an example in that Order. NYNEX Reply at 4; BellSouth Reply at 2; GTE Reply at 1-2; Southwestern Bell Reply at 8-11; Bell Atlantic Reply at 1-2.

11. Various commenters argue that we should not reach the "reverse search" issue raised by ADAPSO and Compuserve. Ameritech Reply at 4-5; BellSouth Reply at 5; AT&T Reply at 5; Southwestern Bell Reply at 14-15. Some of these commenters interpret ADAPSO's and Compuserve's discussion of reverse searches as an admission that electronic directory assistance without reverse search capabilities is a basic service. MCI Reply at 3-4; Southwestern Bell Reply at 4. AT&T denies that finding DLC to be basic will blur the line between basic and enhanced services. AT&T Reply at 4. US West argues that changing the regulatory treatment of directory assistance when it is offered through a different technology could slow technological development. US West Reply at 1-3. Finally, Southwestern Bell contends that tariffing DLC will have no anticompetitive effect because Southwestern Bell will provide the service to resellers on a non-discriminatory basis and allow resellers to connect directly to Southwestern Bell's database. Southwestern Bell Reply at 18-20.

III. DISCUSSION

12. We must determine the regulatory status of DLC because the Part 69 rules that Southwestern Bell has asked us to waive establish requirements for interstate regulated access services. Thus, the waiver request necessarily assumes that DLC would be a Title II communications service. We agree that the *NATA Centrex Order* addresses this question. Under the standard described in that Order for determining whether a service is "basic" or "enhanced," we believe DLC is properly classified as an "adjunct to basic" service.

13. The *NATA Centrex Order* held that a service should be treated as an adjunct to basic service if the service "might indeed fall within possible literal readings of our definition of an enhanced service, but which [is] clearly 'basic' in purpose and use . . . " *NATA Centrex Order*, 101 FCC 2d at 359. The *NATA Centrex Order* quoted a paragraph of the *Computer II Final Decision*,[8] which listed several computer processing services, including directory assistance, which could be offered in conjunction with basic telephone service without causing the service to become enhanced. *NATA Centrex Order*, 101 FCC 2d at 358-59, *quoting Computer II, Final Decision* 77 FCC 2d at 421, para. 98; Second Computer Inquiry, Tentative Decision 72 FCC 2d 358, 395 n.60. The Commission found that "examination of both the nature and purpose of the features approved in *Computer II* can aid us in determining the status of other optional features not specifically delineated in *Computer II* . . . . The computer processing services we there recognized as permissible adjuncts to basic services are services which might indeed fall within our definition of an enhanced service, but which are clearly 'basic' in purpose and use . . . ." *NATA Order*, 101 FCC 2d at 359. The Commission added that "[t]he significance of purpose is perhaps most clear in the case of directory assistance." *Id.* at 360. In the instant case, the purpose of DLC, which, as proposed, is no more than a particular electronic form of the directory assistance discussed in the Commission's Orders, is to facilitate the placement of telephone calls. Accordingly, we conclude that the service is properly treated as an adjunct to basic service.[9]

14. Next, we consider Southwestern Bell's petition for waiver of Sections 69.4(b)(4) and 69.109 of the Commission's Rules to establish a new switched rate element. Section 1.3 of the Commission's Rules provides that waiver petitions can be granted "if good cause therefor is shown." Although electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service. A distinct charge to recover the unique costs of electronic directory assistance from only the users of that service would, therefore, be more consistent with the Commission's cost-causation policies. Thus, good cause exists to permit Southwestern Bell to establish a separate rate subelement for DLC service and, accordingly, we will grant the waiver.

15. Finally, with respect to ALC's petition against Transmittal No. 1741, we have reviewed that petition along with Southwestern Bell's reply. We conclude that no compelling argument has been presented that the tariff revisions as amended are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules filed by Southwestern Bell Telephone Company IS GRANTED.

17. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate Southwestern Bell Transmittal 1741 filed by ALC Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Application No. 223, filed June 6, 1990, pursuant to Special Permission No. 90-561.

[2] Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic); the BellSouth Corporation (BellSouth); New York Telephone Company and New England Telephone and Telegraph Company (together, NYNEX); Pacific Bell and Nevada Bell (together, PacTel); Southwestern Bell; and Cincinnati Bell Telephone Company (Cincinnati Bell).

[3] MCI Telecommunications Corporation (MCI) and American Telephone and Telegraph Company (AT&T).

[4] The parties filing replies are Ameritech; Bell Atlantic; BellSouth; NYNEX; Southwestern Bell; the Mountain States Telephone and Telegraph Company, the Northwestern Bell Telephone Company, and the Pacific Northwest Bell Telephone Company (together, US West); MCI; GTE Service Corporation (GTE); the Dun and Bradstreet Corporation (Dun and Bradstreet); and AT&T.

[5] North American Telecommunications Association, ENF 84-2, 101 FCC 2d 349 (1985), *recon.* 3 FCC Rcd 4385 (1988)(*NATA Centrex Order*).

[6] "Reverse search" capabilities enable the user to locate a name in the database by entering the associated telephone number.

[7] MCI argues that the Commission should regulate DLC as a "byproduct" of local exchange service because it agrees with the parties who argue that EDA serves the same function as operator directory assistance. *See* MCI Comments at 4.

[8] Amendment of Section 64.702(a) of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, Docket No. 20828, 77 FCC 2d 384 (1980)(*Computer II Final Decision*).

[9] Our conclusion applies to the service described by Southwestern Bell in this transmittal. We express no opinion as to the proper regulatory status of "reverse search" directory assistance.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal No. 2175

Revisions to Tariff F.C.C. Nos. 1, 2, 4, 7, 9, 10, 11, 12, and 16

ORDER

Adopted: June 14, 1990; Released: June 15, 1990

By the Chief, Common Carrier Bureau:

1. In Transmittal No. 2175, AT&T Communications (AT&T) revises its rates for central office connections associated with ACCUNET Spectrum of Digital Services (ASDS), DATAPHONE, and voice grade private line services (VGPL). The American Petroleum Institute filed a petition for rejection or partial suspension, and AT&T replied. Transmittal 2175 currently is scheduled to take effect on June 18, 1990. While the transmittal contains a number of provisions, API only opposes the additional monthly recurring charge of $3.00 for VGPL and ASDS multipoint circuits.

2. According to API, many of its members own gasoline service stations which use multipoint VGPL private line networks to support their point-of-sale credit card verification and billing operations. API Petition at 2-3. API argues that AT&T's proposed additional $3.00 monthly charge for VGPL circuits will result in AT&T recovering nonrecurring provisioning and design costs through a recurring charge. API states that provisioning and network design are one-time, nonrecurring activities and therefore the cost of providing these activities should be recovered through one-time, nonrecurring charges. *Id.* at 7. Further, API argues that the rate schedule violates the Commission's cost-causation policy, which is intended to ensure that costs incurred by a particular customer should be paid by that customer and not be assessed against other ratepayers. *Id.* at 7-8. API also claims that AT&T's justification for the charge is mistakenly based on a comparison of average failure rates or the duration of failures on a per circuit basis, which has no bearing on whether multipoint circuits cost more on a per termination basis than two-point circuits. *Id.* at 9.

3. In response, AT&T states that the proposed additional monthly charge for multipoint circuits will recover added costs incurred by AT&T in connection with the provision and maintenance of multipoint circuits that are not incurred with two-point circuits. AT&T maintains that more time and effort is required to design multipoint circuits than two-point circuits and that these circuits have higher than average failure rates and experience troubles of longer duration than two-point circuits. AT&T Reply at 3. AT&T explains further that these problems are due to the size and complexity of multipoint networks and arise on an ongoing basis due to the constant turnover associated with multipoint networks. *Id.* at 4-5.

4. AT&T further states that it may properly recover the added provisioning and design costs associated with multipoint networks through a monthly recurring charge. *Id.* at 6. Finally, AT&T states that it applies the $3.00 monthly charge on a per termination basis because maintenance, testing, and troubleshooting activities are related to the number of terminations. AT&T alleges that trouble reports increase substantially with the number of customer locations on a multipoint network. *Id.* at 7.

5. The Common Carrier Bureau has reviewed Transmittal 2175, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that AT&T's tariff revisions are patently unlawful so as to require rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or partially suspend AT&T Tariff F.C.C. Nos. 1, 2, 4, 7, 9, 10, 11, 12, and 16, Transmittal No. 2175, filed by the American Petroleum Institute IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1990

COMMISSION CLARIFIES INFORMATION REQUESTED IN STRATEGIC PRICING REFUND DOCKET (CC DOCKET NO. 85-166, PHASE II, PART 1)

By letter dated May 22, 1990, the Deputy Chief (Policy) of the Common Carrier Bureau requested additional information from several local exchange carriers who must file proposals for the implementation of refunds because of their strategic pricing of special access services.[1] The carriers must respond by June 21, 1990.

Paragraph 2(a) of the May 22 letter required that recipients identify the refund amounts allocable to each of their customers. In response to inquiries from the recipients of the letter, we hereby clarify the requirements of the May 22 letter. To satisfy paragraph 2(a) recipients may follow either procedure (a) or (b) below.

(a) Carriers may submit to the Commission a list of affected special access customers and corresponding refund amounts, with customers' names supplied and associated with specific refund amounts. Carriers electing this procedure shall also send a copy of their response to the May 22 letter to affected customers.

(b) Alternatively, carriers may request confidential treatment of their customer lists. *See* 47 C.F.R. § 0.459. Carriers seeking confidential treatment must submit two lists of affected customers and corresponding refund amounts to the Commission – one with customers' names redacted, and a separate list with customers' names supplied. Carriers electing this procedure should inform affected customers by letter of their particular refund entitlement, and provide them a copy of the redacted information filing.

The information required to be sent to customers should be mailed no later than June 21, 1990, and carriers must attest to that mailing in their responses to the May 22 letter. Carriers need not send copies of the supplemental information to all parties to this docket, as the Commission will include the supplemental information in the record of this proceeding and will provide an opportunity for public comment at a later date.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 412 (1990) (*Refund Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-3

In re Applications of

COLONIAL COMMUNICATIONS, INC.	File No. BPH-860801MB
BEDFORD CONCEPTS, A California Limited Partnership	File No. BPH-860804ME
DONNA M. MACNEIL	File No. BPH-860804MF
APPLEDORE COMMUNICATIONS, INC.	File No. BPH-860804MI

For Construction Permit for
New FM Station, Channel 243A,
Bedford, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1990; Released: June 25, 1990

By the Review Board: BLUMENTHAL and ESBENSEN.

1. In a *Decision* in this proceeding, 5 FCC Rcd 1967 (1990), the Review Board granted the application of Donna M. MacNeil for authority to construct a new FM broadcast station in Bedford, New Hampshire. We also denied the competing applications of Colonial Communications, Inc., Bedford Concepts, A California Limited Partnership (Concepts), and Appledore Communications, Inc. (ACI) on the grounds that MacNeil was the superior comparative applicant. Now before the Board is a petition for reconsideration filed April 30, 1990 by Concepts; opposition pleadings were filed May 14, 1990 by ACI and May 15, 1990 by MacNeil.

2. In its petition, Concepts submits that it was denied due process because the Board did not specifically rule on its exceptions to those portions of the *Initial Decision* (*I. D.*), 4 FCC Rcd 5969 (1989), disqualifying Concepts under a Rule 1.65 issue [1] and denying integration credit to Patrice Shea, a Concepts principal. Concepts cites, in support of its position, a provision of the Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A), which requires that agency decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." Although it does not specifically address the Board's comparative evaluation of the applicants, Concepts concludes that the Board should make a determination of the other matters it identifies. In opposition to Concepts' petition, ACI argues that, as found in the *I. D.*, Concepts' conduct in this case was of a disqualifying nature, and its principal, Ms. Shea, was entitled to no integration credit. In further opposition to Concepts' petition, MacNeil points out that the Board specifically stated in its *Decision*, at para. 6, that it was addressing only the decisionally significant exceptions and that the Board is authorized to do exactly that under 47 CFR § 1.282(b). MacNeil concludes that the Board's *Decision* complied with the Commission's procedural requirements.

3. We will deny Concepts' petition for reconsideration. The procedural requirement appertaining to administrative agency decision-making, which is cited by Concepts and set out in 5 U.S.C. § 557(c)(3)(A), is incorporated *in haec verba* in the Commission's own procedural rules governing final decisions at 47 CFR § 1.282(b)(1). That rule, however, goes on to provide, at 47 CFR § 1.282(b)(2), that " . . . the Commission will deny irrelevant exceptions, or those which are not of decisional significance, without a specific statement of reasons prescribed by paragraph (b)(1) of this section." [2] As recently explained in *Tri - State Broadcasting Co., Inc.*, FCC 90R-47, adopted June 6, 1990, at para. 9, this latter provision expressly authorizes the Board to focus only on relevant and material exceptions, and to limit its decisions to matters it deems to be of decisional significance. In adhering to this long-standing practice, *see 62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989), *rev. denied*, FCC 90-48, released February 13, 1990; *Brainerd Broadcasting Co.*, 4 RR 2d 547 (Rev. Bd. 1965), we expressely held in our *Decision*, at n.2, that even if Concepts' exceptions on the Rule 1.65 issue and Ms. Shea's integration proposal were granted, it still could not conceivably prevail over MacNeil because of the latter's clear superiority under multiple comparative factors. *See also Decision*, para. 9, and cases cited therein. Concepts does not now specifically challenge this comparative evaluation or show how it could have won this case under the comparative issue. In these circumstances, we see no reason to reach matters, the determination of which would not affect the ultimate outcome of this proceeding. *See George Henry Clay*, 5 FCC Rcd 317 (Rev. Bd. 1990).

4. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed April 30, 1990 by Bedford Concepts, A California Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Concepts was disqualified by the ALJ because its application misleadingly referred to the presence of certain limited partners who in fact were not part of the application, and this misimpression was never corrected by amendment in accordance with Rule 1.65, 47 CFR § 1.65. I.D., para. 80.

[2] The Board, pursuant to Commission delegation, *see* 47 CFR §§ 0.362(a) and 1.271, exercises the same authority and performs all of the review functions which would otherwise have been performed by the Comission under 47 CFR § 1.282.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-296

In re Applications of

MORRILL RADIO PARTNERSHIP (hereafter "Morrill")	File No. BPH-880816NA
BARDEN RADIO, INC. (hereafter "Barden")	File No. BPH-880816ND
Richard J. Doud and Mary Helen Doud d/b/a R.D. COMMUNICATIONS (hereafter "Doud")	File No. BPH-880816OH
BAYPOINTE BROADCASTING CORPORATION (hereafter "Baypointe")	File No. BPH-880816OT

For Construction Permit for a
New FM Station on Channel 247A (97.3 MHz)
in Essexville, Michigan

HEARING DESIGNATION ORDER

Adopted: May 21, 1990; Released: June 25, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Baypointe*. Information before the Commission indicates that Baypointe was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Baypointe's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Baypointe in this proceeding.

3. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENT FILED
Morrill	March 14, 1990
Barden	January 17, 1989; February 16, 1989; June 6, 1989; August 8, 1989; October 6, 1989; November 21, 1989; February 27, 1990; April 12, 1990

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Doud would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Baypointe.

2. To determine whether Baypointe's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Baypointe possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by Doud would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Morrill and Barden ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-302

In re Applications of

WOODY LIMITED PARTNERSHIP (hereafter "Woody")	File No. BPH-880630MM
SANDRA M. ADAIR VAUGHAN (hereafter "Vaughan")	File No. BPH-880630MQ
WALSH & PARTNERS COMMUNICATIONS, INC. (hereafter "Walsh")	File No. BPH-880630NT
PETERSBURG FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "FM Broadcasters")	File No. BPH-880630NX
SLADECO BROADCASTING LIMITED PARTNER - SHIP, A VIRGINIA LIMITED PARTNERSHIP (hereafter "Sladeco")	File No. BPH-880630OC

For Construction Permit for a
New FM Station on Channel 262A (100.3 MHz)
in Petersburg, Virginia

HEARING DESIGNATION ORDER

Adopted: May 30, 1990; Released: June 25, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Walsh*. Information before the Commission indicates that Walsh was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Walsh's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Walsh in this proceeding.

3. *Sladeco*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Sladeco has filed such a statement, it is deficient. Sladeco has not listed minority and women's organizations to encourage the referral of qualified minority and women applicants for job vacancies; employment services which refer job candidates without regard to their race, color, religion, national origin or sex; or area schools and colleges with minority and women enrollments to be contacted for recruitment purposes. Accordingly, Sladeco will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

4. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Walsh	October 27, 1988; September 13, 1989
FM Broadcasters	April 17, 1989

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Walsh.

2. To determine whether Walsh's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Walsh possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Sladeco shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Walsh and by FM Broadcasters ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-316

In the Matter of

Amendment of Section 73.202(b), RM-7059
Table of Allotments,
FM Broadcast Stations.
(Rocky Mount, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1990; Released: June 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Radio Triangle East Company (petitioner), permittee of Station WSAY-FM at Rocky Mount, North Carolina, requesting the substitution of Channel 253C3 for Channel 253A at Rocky Mount and the modification of its construction permit to specify the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 253C3 can be allotted to Rocky Mount in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station WSAY-FM's outstanding construction permit (File No. BPH-870429MG).[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 253C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 253C3 at Rocky Mount or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 253C3 for Channel 253A at Rocky Mount, North Carolina, since it could enable the station to provide the community with an additional wide-coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rocky Mount, North Carolina	221A, 253A, 264C	221A, 253C3, 264C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 20, 1990,** and reply comments on or before **September 4, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Meredith S. Senter, Jr., Esq.
Stephen D. Baruch, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W, Suite 600
Washington, D.C. 20006-1809
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-54-43 and West Longitude 77-50-06. Because this allotment is proposed as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules, if this allotment is made. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-317

In the Matter of

Amendment of Section 73.202(b), RM-7312
Table of Allotments,
FM Broadcast Stations.
(Nags Head, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1990; Released: June 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Coastal Radio, Inc. (petitioner), permittee of Station WNHW, Nags Head, North Carolina, requesting the substitution of Channel 223C3 for Channel 222A at Nags Head, and the modification of its construction permit to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 223C3 can be allotted to Nags Head in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.7 kilometers (4.8 miles) south to avoid a short-spacing to Station WYFL, Channel 223C, Henderson, North Carolina.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 223C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 223C3 at Nags Head or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 223C3 for Channel 222A at Nags Head, North Carolina, since it could permit Station WNHW to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Nags Head, North Carolina	222A	223C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 20, 1990,** and reply comments on or before **September 4, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David D. Oxenford, Esq.
Matthew P. Zinn, Esq.
Fisher, Wayland, Cooper & Leader
1255 - 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-53-22 and West Longitude 75-35-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-318

In the Matter of

Amendment of Section 73.202(b), RM-7311
Table of Allotments,
FM Broadcast Stations.
(New Washington, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1990; Released: June 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Good News Broadcasting (petitioner), requesting the allotment of Channel 227A to New Washington, Ohio, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 227A can be allotted to New Washington in compliance with the Commission's minimum distance separation requirements with a site restriction of 11 kilometers (6.8 miles) northwest to avoid a short-spacing to Station WQEL, Channel 224A, Bucyrus, Ohio, and Station WZAK, Channel 226B, Cleveland, Ohio.[1] We note that this allotment conflicts with the recently filed application of Station WKKJ, Channel 227B, Chillicothe, Ohio (BPH900226IB). However, as is well established Commission policy, rule making proposals which provide substantial service benefits are generally preferred over minor modification applications since the application represents only a preference for a particular transmitter site. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984, *Las Vegas, Nevada*, 51 FR 9453, March 19, 1986. A copy of this *Notice of Proposed Rule Making* will be served on Central Broadcasting Corporation, licensee of Station WKKJ. Canadian concurrence is required since New Washington is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 227A to New Washington, Ohio, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
New Washington, Ohio	--	227A

4. IT IS ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station WKKJ, as follows: Central Broadcasting Corporation, 2301 Main Street, P.O. Box 727, Richmond, Indiana 47375.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 20, 1990,** and reply comments on or before **September 4, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-02-30 and West Longitude 82-55-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-319

In the Matter of

Amendment of Section 73.202(b), RM-7201
Table of Allotments,
FM Broadcast Stations.
(Oscoda, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1990; Released: June 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by David C. Schaberg (petitioner), requesting the substitution of FM Channel 264C3 for Channel 261A at Oscoda, Michigan. Petitioner also requests modification of his construction permit (File No. BPH-851216MM) for Channel 261A to specify Channel 264C3. Petitioner states that he will apply for the channel, if allotted.

2. An engineering analysis reveals that Channel 264C3 can be allotted to Oscoda, Michigan, in compliance with the Commission's spacing requirements at the petitioner's specifed site.[1] Since Oscoda is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government to this proposed allotment will be requested.

3. We believe the public interest would be served by proposing the substitution of Channel 264C3 for Channel 261A at Oscoda, Michigan, because this would enable the community to have a second wide coverage area FM channel. As requested, we shall also propose to modify the petitioner's construction permit for Channel 261A to specify Channel 264C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 264C3 at Oscoda or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Oscoda, Michigan	239C2, 261A	239C2, 264C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 20, 1990,** and reply comments on or before **September 4, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David C. Schaberg
P.O. Box 21055
Lansing, Michigan 48909-1055

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 264C3 are 44-30-00 and 83-20-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-376

In the Matter of

Amendment of Section 73.202(b), RM-6871
Table of Allotments,
FM Broadcast Stations.
(Aitkin, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 18, 1990; Released: June 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6655 (1989), issued in response to a petition filed by Upper Minnesota Broadcasting Corporation (petitioner), proposing the substitution of FM Channel 232C3 for Channel 232A at Aitkin, Minnesota. Petitioner also requested modification of its license for Station KEZZ, Channel 232A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Aitkin, Minnesota, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by petitioner.[1] Since Aitkin is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. In addition, we are modifying the petitioner's license for Station KEZZ, Aitkin, Minnesota, to specify operation on Channel 232C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 13, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Aitkin, Minnesota	232C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KEZZ, Aitkin, Minnesota, IS MODIFIED TO SPECIFY operation on Channel 232C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 232C3 at Aitkin are 46-36-15 and 93-39-55. The licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules because the petition which resulted in this allotment was filed prior to October 2, 1989. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 26, 1990

ROCHESTER TELEPHONE CORPORATION FILES PETITION FOR WAIVER OF PART 69 TO PERMIT OFFER OF INTERSTATE SWITCHED 56 KBPS SERVICE Pleading Cycle Established

On May 18, 1990, the Rochester Telephone Corporation (Rochester) filed a petition for waiver of Part 69 of the Commission's Rules to permit Rochester to offer interstate switched 56 kbps digital service on an optional basis. This service would permit end users served by designated end offices in Rochester's service area to interconnect with interexchange carriers on an entirely digital basis.

Interested parties may file comments regarding the Rochester waiver petition no later than **July 20, 1990.** Reply comments may be filed no later than **August 6, 1990.** The Commission does not expect to extend this pleading cycle.

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Rochester's waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of

EUNICE WILDER and SHERIDAN BROADCASTING CORP. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE

For Construction Permit for a
New FM Station on Channel 266A
in Richmond, Virginia

Appearances

Morton L. Berfield, *Roy W. Boyce*, and *Lewis I. Cohen*, on behalf of Eunice Wilder and Sheridan Broadcasting Corp. d/b/a Weyburn Broadcasting Limited Partnership; *William E. Kennard*, *Terrence J. McCartin*, *Susan F. Heck*, and *David A. Naimon*, on behalf of WKIE-FM, Inc.; *Lauren A. Colby*, on behalf of Barbara B. Benns; *Richard J. Bodorff*, *Jonathan W. Emord*, *John K. Hane* and *John C. Masterson*, on behalf of James River Communications Corporation; *Frederick W. Finn*, *Robyn G. Nietert*, and *Robert J. Rini*, on behalf of Future Broadcast Limited Partnership; *Israel Teitelbaum*, on behalf of Witjo Broadcasting, Inc.; *David M. Silverman*, *Robert G. Scott, Jr.*, and *Kenneth A. Grant*, on behalf of Penny Drucker; *Gregg P. Skall*, *Dan J. Alpert*, *M. Tracy Neuhauser*, *Patricia S. McKin*, *Edwad P. Taptich*, *Grier C. Raclin*, *Lauren K. Voltmer*, on behalf of Virginia Communications Limited Partnership.

SUPPLEMENTARY SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: June 18, 1990; Released: June 26, 1990

PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 90R-13, released February 15, 1990, the Review Board remanded this proceeding to the Presiding Judge for the trial of the following issues:

> 1. To determine whether James River is, or has been continuously financial qualified since it filed its application, and, if not, the effect thereof on its basic qualifications to be a Commission licensee; and
>
> 2. To determine whether James River has violated Section 1.65 of the Commission's Rules by failing to report material information concerning its financial qualifications, and, if so, the effect thereof on its basic qualifications to be a Commission licensee.

2. Now before the Presiding Judge are are "Motion For Summary Decision" filed May 4, 1990 by James River Communications Corporation (James River),[1] Opposition To "Motion For Summary Decision" filed May 17, 1990 by Barbara B. Benns (Benns), Opposition To Motion For Summary Decision filed May 29, 1990 by Future Broadcast Limited Partnership (Future), Opposition To James River's Motion For Summary Decision filed May 29, 1990 by Witjo Broadcasting, Inc. (Witjo), Opposition To Motion For Summary Decision filed May 29, 1990 by Weyburn Broadcasting Limited Partneship (Weyburn).

FINDINGS OF FACT

3. The Board's addition of financial and Section 1.65 issues rested on the following bases:

> a. that "a building . . . *owned* by the Charitys collapsed" (emphasis added) purportedly causing the Charitys to suffer financial harm [*MO & O* at para. 4];
>
> b. that the bank of Virginia's December 11, 1988 letter of reasonable assurance to James River was adversely affected by financial hardships suffered by the Drs. Charity attendant to the medical building collapse [*MO & O* at para. 7];
>
> c. that two lawsuits filed against Ms. McDaniel by Commercial Credit Corporation (in July 1987 for $10,000) and by Dominion Bank of Richmond,

N.A. (in October 1988 for $10,974.36) indicated an inability on her part to pay prosecution expenses *[MO & O* at para. 7]; and

d. that the withdrawal of the applicant's FCC counsel for nonpayment of legal fees on November 18, 1987 indicated an *inability* on the applicant's part to meet its prosecution expenses.

The papers submitted by James River in support of its motion demonstrate beyond doubt that (1) the medical building collapse had no adverse impact on the Charitys' financial wherewithal; (2) the Bank of Virginia letter of December 11, 1985 remained *bona fide* and in full force and effect from the day of its issuance until January 15, 1988, the day Robert Fish acquired the Charitys' stock; (3) the two lawsuits filed against McDaniel were paid in full and withdrawn[2] and did not affect McDaniel's ability to meet her 20% financial commitment to James River; and (4) the applicant has made consistent and substantial payments for prosecution expenses and is now current and paid-in-full on all such expenses and so has not failed to meet its prosecution expenses.

4. *Building Collapse* - The primary underpinning for the Board's addition of issues was the Board's assumption that the Charitys owned the medical building that collapsed and that the Charitys suffered a material financial loss as a result of this occurrence.[3] Both of these assumptions are factually in error. The medical building undergoing construction was owned by a General Partnership called the West End Medical Group. Only Dr. Cynthia Charity had an ownership interest. She was a general partner with a 16% equity interest. Her husband, Dr. Renard Charity, was one of several guarantors on the Partnership loan from Sovran Bank. The Partnership had a general liability insurance policy which was available to cover any indebtedness caused by the accident. The Partnership's liability was limited to repayment of draws made on the proceeds from state industrial development revenue bonds held at the Sovran Bank. Dr. Cynthia Charity's capital contribution to the partnership of $8,240 represented the full extent of her capital loss. The accident was due to the fault of the General Contractor and no suits arising out of the facts and circumstances of the accident were ever filed against the Partnership. In sum, there exists not the slightest doubt upon this factual record that the medical building collapse had no material adverse impact upon the Charity's ability to meet their financial commitment to James River.

5. *Bank of Virginia Commitment* - The unrebutted testimony of the banker who executed the December 11, 1985 Bank of Virginia letter establishes that at all times from the letter's issuance until the stock purchase by Robert Fish, the Bank of Virginia remained willing to give James River a $500,000 loan in accordance with the letter's terms. His testimony also makes clear that the bank letter was never in jeopardy because of the medical building collapse.

6. The facts establish that the Bank of Virginia had before it in December of 1985 all requisite information (including the Charity's personal financial statements and their tax returns) to adjudge whether the bank would be willing to make a commitment to loan James River $500,000. Each year thereafter, the Bank continued to receive the Charitys' personal financial statements and tax returns and was aware of their financial condition. Stated the banker in his declaration:

The Drs. Charity were long term customers of the Bank of Virginia (from since at least 1980) and held an account with us. In addition, the Bank had on hand financial statements for the Drs. Charity indicating that their net worth as of September 15, 1985 was in excess of $2.3 million, more than four times the amount of the loan being sought. Financial statements and tax returns from the Drs. Charity have been submitted to the bank periodically since that time. These statements and tax returns confirm that the Drs. Charity have had more than enough net worth to support a $500,000 loan from September of 1985 to the present.

Relying upon these documents, upon the willingness of Ms. McDaniel and the Drs. Charity to provide their personal guarantees to support any loan and to permit the Bank to establish a lien on station equipment and upon the representations made by Mr. Bayliss on behalf of James River Communications Corporation, the Bank issued the attached letter of December 11, 1985. That letter set out the terms and conditions under which the Bank of Virginia would be willing to make a $500,000 loan to James River Communications Corporation.

It is the Bank's position that the letter of December 11, 1985 remained valid and in full force and effect from the date of its issuance until the date on which Robert Fish acquired the Charity's [sic] stock in James River Communications Corporation.

From December of 1985 until approximately January 15, 1988 when Robert Fish acquired the Charity's stock, I knew of no adverse financial circumstance that would warrant a change in the bank's letter of December 11, 1985. None of the updated personal financial statements or tax returns submitted by the Charity's [sic] to the Bank indicated any such adverse change. Furthermore, I have reviewed my records and can verify that at the time of the medical building collapse, September of 1987 and shortly thereafter, the Drs. Charity did not suffer any material adverse financial loss which I was made aware of which would have warranted a change in the bank's letter of December 11, 1985.

See Exhibit K, Declaration of John Vogel. Therefore, it is patently and demonstrably clear that the Bank of Virginia letter of December 11, 1985 was not adversely affected by the collapse of the medical building on September 24, 1987. Upon this factual record, there exists not the slightest doubt that the Bank of Virginia's letter of December 11, 1985 remained *bona fide* and in full force and effect from December 11, 1985 until January 15, 1988, the day upon which Robert Fish replaced the Drs. Charity as the applicant's non-voting stockholder.

7. *Lawsuits Against McDaniel.* In its *MO & O*, the Board noted that "the exceptors point to two lawsuits filed against McDaniel by Commercial Credit Corporation (in July 1987 for approximately $9,000), and by the Dominion Bank of Richmond, N.A. (in October 1988 for approximately $10,000), which, they argue, raise further financial questions concerning whether McDaniel can or will meet her *pro rata* share of the applicant's expenses." *MO & O* at para. 7. However, the Board overlooked the fact that each loan was repaid in full by McDaniel *prior* to the filing of the first motion raising these matters below.

Indeed, the banks concerned *withdrew* their suits in recognition of the payments. Consequently, it is clear that these suits do not establish a lack of financial wherewithal on the part of McDaniel to pay her *pro rata* share of James River expenses. McDaniel did pay both of the debts in question and this fact wholly vitiates any inference that would otherwise be present were the suits outstanding. Moreover, the testimonial evidence reveals that all current legal debts of McDaniel are being timely paid and are not in arrears.

8. The Presiding Judge's findings concerning McDaniel's financial contributions up until the time of the March 18, 1988 comparative hearing are uncontroverted and corroborate that McDaniel did meet her *pro rata* share of expenses up until the time of the hearing.

> McDaniel is obligated to pay 20 percent of corporate expenses. The non-voting stockholders are obligated to pay 80 percent (Tr. 1310). As of the time of the March 18, 1988 hearing session, McDaniel had paid 35% of applicant costs, 15% above her equity obligation (Tr. 1311; James River Ex. 3). After paying the additional amount, McDaniel made no attempt to get the difference from the 80 percent equity holders (Tr. 1311). The additional 15 percent paid by McDaniel is not a loan to the corporation (Tr. 1311). It is a contribution (Tr. 1312). She acquired no additional equity for this contribution (Tr. 1312). *Initial Decision*, FCC 89D-24, released July 3, 1989, para. 111.

The recent deposition confirms these findings. Accordingly, the factual record lends no support to the argument that McDaniel was or is unable or unwilling to meet her share of prosecution expenses. Indeed, the record confirms that McDaniel paid more than her share until the hearing in this case and has, since that time, maintained a commitment to pay 20% of the payments made by Robert Fish to finance the remaining expenses of the applicant. Based on this factual record, there exists no basis to doubt the ability of McDaniel to meet her financial commitment to the applicant.

9. *Payment of Prosecution Expenses*. The record establishes that during the period of time when the Drs. Charity were non-voting stockholders in the applicant, the Charitys recognized a legal obligation and were committed to pay 80% of the applicant expenses. As the record reveals, Dr. Cynthia Charity wasn't aware that the firm of Fisher, Wayland had for any period of time stopped representing the applicant for non-payment of legal fees. As the Drs. Charity testified, in their efforts to remain insulated from contacts with McDaniel concerning prosecution of the James River application, they were limited in their knowledge of the proceeding to that which William Bayliss, Secretary to James River and local legal counsel to the corporation told them. At no time were the Drs. Charity unwilling or unable to honor their financial commitments to the applicant. The Drs. Charity remained committed to pay all debts and would have done so even past January 15, 1988 were it not for the arrival of new non-voting stockholder, Robert Fish who assumed the debts due and brought the balance current on the account. The testimony of Bayliss corroborates the Drs. Charity's financial commitment to James River.

10. Pursuant to a Memorandum of Agreement between McDaniel and Robert Fish, McDaniel continues to be liable for 20% of applicant expenses, and Fish is liable for 80% of applicant expenses. Fish has paid for applicant expenses and all bills since his purchase of the Charitys' and Dr. Kyles' shares of non-voting stock. However, pursuant to a personal loan with Fish, McDaniel is liable for 20% of all costs incurred by the applicant. The loan arrangement with Fish provides McDaniel with an additional source of funds to meet her share of prosecution expenses.

11. A review of payments for legal fees from May of 1985 to the present reveals that although legal fees have not always been paid promptly, the applicant has paid its prosecution expenses. Moreover, at the time counsel withdrew from the case on November 18, 1987, the James River account was in arrears for only a two month period and by only $7,853.50. The *de minimis* amount in arrears pales into insignificance when measured by the fact that James River has paid over $150,000 in legal fees to date. Based upon the record, there exists no basis in fact to question either the commitment of James River's principals to pay the costs of prosecution or their ability to do so.

CONCLUSIONS

12. A party seeking summary decision must show that there is no genuine issue of material fact left to be determined at a hearing. Section 1.251(a)(1) of the Commission's rules. Summary Decision can only be granted when the truth is clear, the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975). The moving party's papers must be carefully scrutinized, while the papers of opposing parties must be treated with considerable indulgence. *Summary Decision Procedures*, 34 FCC 2d 485, 488 (1972). Applying these principles, the papers submitted by James River establish, beyong peradventure of doubt, that James River has been financially qualified from the date of application filing to the present. Further, since James River's financial qualifications have never been impaired, it has not violated the Commission's reporting requirements. In addition, although James River's opponents have had the benefit of deposing all witnesses with pertinent evidence and been given voluminous documentary evidence, their mighty labors have failed to uncover even a shred of doubt as to James River's financial qualifications. In the absence of evidence of any remaining genuine issue of material fact, summary decision is mandated. The issues added by the Board will be summarily resolved in favor of James River.[4]

Accordingly, IT IS ORDERED, That the "Motion For Summary Decision filed May 4, 1990 by James River Communications Corporation IS GRANTED and the issues added by the Review Board ARE RESOLVED in favor of James River Communications Corporation.

IT IS FURTHER ORDERED, That unless an appeal from this Supplementary Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules,[5] the grant of the application of James River Communications Corporation (BPH-85121600) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Attached to James River's motion are the transcripts of the depositions taken of Dr. Renard Charity, Dr. Cynthia Charity, William D. Bayliss, John Vogel, Claudette McDaniel, and Robert Fish (Volume II), Appendix I through VI. Also attached are documents pertinent to the issues raised by the Board (Volume I, Exhibits A through P).

[2] In fact, full payment had been made prior to Benns' motion to enlarge issues filed January 23, 1989. *See MO & O*, FCC 89M-860, released March 17, 1989.

[3] The Board mistakenly relied on McDaniel's deposition given in January 1988 in assuming that the building collapse adversely affected James River's financial qualifications (*MO & O*, para. 4). The Board overlooked McDaniel's hearing testimony where she clarified her deposition testimony. She made clear there that her deposition statements were assumptions, not factual. Hearing Tr. at 1334-1336. At her recent deposition, McDaniel explained that she derived her knowledge of the event solely from news reports. *See* Appendix V at 179. It is therefore clear that McDaniel's impression that the Charitys suffered economically was grounded on speculation, not on fact, and is discounted in light of the factual record, *infra*.

[4] The parties urge that the Presiding Judge's examination of the demeanor of the witnesses is necessary. For what purpose? The deponents have given consistent testimony. No evidence has been offered contradicting their accounts.

[5] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F. R. 1276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-305

In re Applications of

AUDREY R. MORRIS (hereafter "Morris")	File No. BPH-880630ME
FOGEL BROADCAST LIMITED PARTNERSHIP (hereafter "Fogel")	File No. BPH-880630MN
FRANK L. BAKER & WILLIAM L. MCELVEEN, d/b/a PAWLEY'S ISLAND BROADCASTING GENERAL PARTNERSHIP (hereafter "PIB")	File No. BPH-880630MY
ROBERT R. HILKER (hereafter "Hilker")	File No. BPH-880630NA
MGR LIMITED PARTNERSHIP (hereafter "MGR")	File No. BPH-880630NO
CAROLINA COMMUNICATIONS V LIMITED PARTNERSHIP (hereafter "CCV")	File No. BPH-880630NU
PAWLEY'S ISLAND COMMUNICATIONS, INC. (hereafter "PIC")	File No. BPH-880630OB

For Construction Permit for a
New FM Station on Channel 262A (100.3 MHz)
in Pawley's Island, South Carolina

HEARING DESIGNATION ORDER

Adopted: May 30, 1990; Released: June 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Fogel	August 9, 1989; October 23, 1989
PIB	October 12, 1988; July 14, 1989
Hilker	October 26, 1989
CCV	March 9, 1989; March 13, 1990

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. MGR has not completed Item 4 correctly. MGR's application gives a post office box number as the residence address for Margaret G. Robinson. Accordingly, MGR must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Fogel, PIB, Hilker and CCV ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That MGR shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-007-LA

Application for authority to participate in the launch of the INTELSAT VI (F-4)

ORDER AND AUTHORIZATION

Adopted: June 19, 1990; Released: June 26, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-007-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, and updated on June 14, 1990, for authority to participate in the launch, positioning and in-orbit testing of the modified INTELSAT VI (F-4) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received

3. The INTELSAT VI (F-4) was delivered from the manufacturer's facility by land transport and arrived at the launch site in Florida in late January 1990, and is scheduled to be launched on June 23, 1990, utilizing a Titan III commercial launch vehicle. This satellite will replace the INTELSAT V-A (F-11) at 332.5^0 East Longitude. The INTELSAT V-A (F-11) will be moved to 63^0 East Longitude and serve the Indian Ocean Region Major Path/ spare role. It is anticipated that the INTELSAT VI (F-4) will be in service by early September 1990.

4. The estimated costs associated with the INTELSAT VI (F-4) are as follows (all amounts in real year dollars):

HAC Contract (including delivery price, engineering charges and amendments and launch support)	$129,320,000
Performance incentives, capitalized	$ 11,127,000
Performance incentives, expensed	$ 15,488,000
Martin Marietta Launch Vehicle and services	$ 121,378,000
TOTAL INTELSAT	$277,313,000
TOTAL COMSAT (based on current ownership share of 23.9 %)	$ 66,277,807

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT VI (F-4) satellite to be positioned at 332.5 degrees East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VI (F-4) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NEW YORK CELLULAR GEOGRAPHIC SERVICE AREA, INC. File No. 03537-CL-MP-89

For Authority to Modify Station KNKA203 Operating on Frequency Block B in the Buffalo, New York Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1990; Released: June 26, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. New York Cellular Geographic Service Area, Inc. (New York) has filed an application for authority to modify its existing Station KNKA203 facilities in the Domestic Public Cellular Radio Telecommunications Service on frequency Block B serving the Buffalo, New York Metropolitan Statistical Area (MSA).[1] Buffalo Telephone Company (Buffalo), by letter dated August 31, 1989, filed an informal petition to deny the captioned application. New York filed an opposition to Buffalo's informal petition. For the reasons set forth below, we deny the informal petition to deny and grant New York's application.

II. BACKGROUND AND CONTENTIONS

2. In its application, New York proposes to modify the antenna and existing power levels of two of its existing cellular facilities (the South Wales and Concord cell sites) in the Buffalo, New York MSA for the purpose of improving the quality of service provided to New York's customers in the Buffalo, New York MSA. Buffalo, in its informal petition, alleges that New York's application proposes impermissible extensions into an adjacent Rural Service Area (RSA) while decreasing coverage inside the Buffalo MSA.[2] Additionally, Buffalo argues that New York's proposed modification is at odds with the Commission's *de minimis* extension rules and policies.

3. In response, New York contends that its proposed modifications to the South Wales and Concord cell cites are necessary to improve the reliability and quality of cellular service within the Buffalo MSA. New York alleges that the Bogner directional antenna presently used in its Buffalo MSA, because of its design characteristics, does not provide reliable coverage to areas of rugged terrain which include several towns within the Buffalo MSA. New York further argues that the accomplishment of this objective unavoidably requires a minor extension of the 39 dBu contours of the South Wales cell site into the adjacent RSA. Additionally, New York asserts that the proposed extension has been minimized via an Antenna Specialists ASPD-952 side-mounted replacement antenna system, by shielding, and by a reduction of power. These factors, it argues, limit the extension to 27 square miles of rural area or approximately 5% of the total Buffalo MSA.[3]

III. DISCUSSION

4. In *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd. Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984), and in Section 22.903(a) of the Rules,[4] the Commission established guidelines for configuring 39 dBu contours. The Commission stated that 39 dBu contours should be contained entirely within the MSA or NECMA and that any *de minimis* extension beyond the CGSA would not render an application defective if the application included a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA). In evaluating the explanation, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. *See e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987) (*Saco); Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989).

5. Our review of the captioned application indicates that New York's proposed extension is approximately 5% of the total Buffalo, MSA.[5] New York explains that in order to improve reliability and provide quality service to its customers in the Buffalo MSA, it was necessary to make the modification which requires a minor extension of the 39 dBu contours of the South Wales cell site into the adjacent RSA. New York has also taken several steps in engineering the site to minimize the extension, including using a side-mounted antenna and reducing radiated power towards the area of extension. Based upon these justifications and New York's explanation for this extension, including its intent to provide service to towns within its Buffalo MSA which encompass rugged territory, we conclude that this extension is *de minimis* and permissible. *See Modesto Celltelco.*, 2 FCC Rcd 4775 (Mob. Serv. Div. 1987).

6. In addition, we find New York fully qualified to effectuate its proposals and that granting the instant application to make modifications to cellular station KNKA203 would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED that the application (File No. 03537-CL-MP-89) of New York Cellular Geographic Service Area, Inc. is GRANTED. This authorization does not include the right to any interference protection in any areas outside the Buffalo, New York MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

8. IT IS FURTHER ORDERED that the informal petition to deny filed by Buffalo Telephone Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice of the filing was dated August 1, 1989 (Report No. CL-89-234).

[2] Buffalo also contends that New York's application is procedurally defective because the application uses a cell numbering system inconsistent with the FCC-issued license, fails to show the entire CGSA, and fails to depict the contours of all cell sites within the CGSA. After a review of the application by Mobile Services Division staff, we find these allegations to be without merit because New York has rectified these minor procedural deficiencies by permissible amendments.

[3] The 39 dBu contours of the South Wales cell site show proposed coverage of 332 square miles, of which 95% is within the Buffalo MSA and 5% extends within the adjacent RSA.

[4] Section 22.903(a) states in pertinent part:

> The Cellular Georgraphic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, A New England County Metropolitan Area (NECMA), as modified in paragraph (e), of this section, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA . . . .

[5] We note that the extension in *Saco*, *supra*, was approximately 6% of the total NECMA.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 18, 1990

Released: June 26, 1990

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Gregory P. Barber, President
Narragansett Broadcasting Company of California, Inc.
Licensee, Radio Station KSJO(FM)
1420 Koll Circle
San Jose, CA 95112

Dear Mr. Barber:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On August 24, 1989, we asked for your comments concerning complaints received by the Commission alleging that portions of the "Perry Stone Show" (transcripts of which are attached) broadcast by KSJO(FM), San Jose, CA, contained indecent material. The broadcasts at issue occurred from 7:00 to 8:00 a.m. on October 19, 20, 25, 27, 28 and November 10; from 8:00 to 9:00 a.m. on November 4; and from 9:00 to 10:00 a.m. on October 31 and November 10 and 14, 1988.

Your September 21, 1989, response to our letter of inquiry concerning these broadcasts advises, for background purposes, that you discharged Perry Stone from KSJO on March 14, 1989, and immediately put into practice your decision to cease broadcasting the kind of language and "shock" humor that generated the complaints against Perry Stone's program. You also advise that you met with some of the complainants in May and June 1989 and issued a news release and a public apology with respect to the Perry Stone Show prior to any Commission inquiry regarding the matter.

You describe KSJO management's efforts, prior to Perry Stone's dismissal, to comply with Commission rulings regarding indecency, and state that management first became aware of the particular broadcasts here at issue when complainants submitted transcripts to the station in November 1988. You concede that the broadcasts in question were "tasteless" and may have been "offensive to many listeners," but in view of strong listener support for the Perry Stone Show and your uncertainty about how to apply Commission standards, you did not suspend the programming until you had determined that Perry Stone was "insufficiently responsive to program direction and could not be persuaded to satisfactorily conform to KSJO guidelines." Citing the "largely unsettled" state of the law on actionable indecency, you assert an inability, continuing into the present, to determine whether the particular broadcasts, especially those involving double entendre, violated the Commission's articulated indecency standards. In addition, based on your belief that "parents would normally be in a position to supervise their children's radio listening" before 9:00 a.m., you question whether the seven broadcasts occurring before that hour are actionable even if they were indecent.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (" *ACT* ").

We find that the subject broadcasts all fit squarely within the definition of indecency quoted above. Even in the cases of double entendre, not only was the language understandable and clearly capable of a specific sexual or excretory meaning but, because of the context, the sexual and excretory import was inescapable. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon.*, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, *supra*. As the broadcasts occurred during daytime hours, they are legally actionable. Indeed, in *ACT*, the Commission's application of its indecency standard to broadcasts aired between 6:00 and 10:00 a.m. was specifically upheld regarding the broadcast at issue in *Infinity*, *supra*. With respect to KSJO's subsequent efforts to avoid the broadcast of indecent material, the Commission generally considers prompt and effective remedial action by a licensee as mitigative in determining the appropriate sanction level in an enforcement proceeding. In this case, however, we do not believe that the licensee's actions, while perhaps ultimately effective, were such as should affect the sanctions imposed for the broadcasts cited in this letter. Your letter states, for example, that the specific incident that triggered Stone's suspension was unrelated to the Commission's indecency policies.

Thus, it appears that on the above-referenced dates in October and November 1988, at the times stated, Station KSJO(FM) violated 18 U.S.C. § 1464 by airing indecent programming at times when there was a reasonable risk that children may have been in the audience. Accordingly, pursuant to Section 503(b) of the Communications Act, Narragansett Broadcasting Company of California, Inc., is hereby advised of its apparent liability for a forfeiture of twenty thousand dollars ($20,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be

imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on June 7, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Attachments
cc: Peter D. O'Connell, Esq.

Radio Station KSJO-FM, San Jose, CA
The Perry Stone Show 6:00 to 10:00 a.m.
Tape #1 Side "A"

1. 10/25/88 7:00 - 8:00 a.m.

CA: Caller

PS: Perry Stone

CA Hello

PS Sophie, baby.

CA What do you want?

PS Sophie baby, I love 'ya. You know how much I love you?

CA I love you too, Perry.

PS You know how much I appreciate you?

CA What do you want?

PS I love you. I'd love to, I'd love to lick the matzo balls right off your butt. As a matter of fact, I'd put it right there in the middle.

CA Perry, you didn't get enough sleep last night. That's why you're talking like this.

PS I'd like to have a smorgasbord in your butt. I'd like to have matzos in there with borsch, everything. I'd just have a buffet.

CA You wouldn't find your way out, darling.

PS I know that.

2. 10/20/88 7:00 - 8:00 a.m.
Song: To the tune of the "Beverly Hillbillies" theme.

Come a listen to story about a man named Boas, a poor politician that barely kept his winky fed, then one day he's poking a chick and up from his pants came a bubbling crude. Winky oil. Honey pot. Jail bait. Well, the first thing you know, old Roger's doing jigs. Some kin folks said, "Rog, move away from there." Jail bait is the place where I really want to be. So he loaded up his winky and he did it with Beverly. Big breasts. Only 15 years old. Going to jail. Well, now it's time to say goodbye to Boas and his friends and they would like to thank you folks for kindly dropping in. You're all invited back to this jail serenity and hope you bring some chick called Dorothy.

Radio Station KSJO-FM, San Jose, CA
Tape #1 Side "B"

3. 11/4/88 8:00 - 9:00 a.m.
11/10/88 9:00 -10:00 a.m.

Song: Sore Pussy

My pussy cat was scratching out on the back door, scratched so long, poor pussy got sore. Sore pussy, sore, pussy, just a friendly little cat. Friendly little cat. My pussy cat was sitting out on the front step, sat so long poor pussy got wet. Wet pussy, sore, wet, pussy, just a friendly little cat. Friendly little cat. My pussy cat was playing out on the back lot, played so long, poor pussy got hot. Hot pussy, sore, wet, hot, pussy, just a friendly little cat. Friendly little cat. My pussy cat was rocking in the rocking chair, rocked so long he lost his hair, bald pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor and I, out at the clothes line, I said to my neighbor, won't you look at mine, my pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor sold my kitty but I did see, I said to my neighbor set my pussy free. Free pussy, sore, wet, hot, bald, free, pussy, just a friendly little cat. Friendly little cat. Here kitty, kitty, kitty, kitty, kitty, ahhh, nice pussy.

4. 11/10/88 7:00 - 8:00 and 9:00 -10:00 a.m.
11/14/88 9:00 - 10:00 a.m.

PS All right, we got one contestant hanging on the line and play my three bongs, if you want. If you want to participate, 408-575-1800 from ninety-two three, KSJO.

Music Coming soon, S and M Pictures presents, Pecker. Pecker, it's hiding in the bush. Pecker, he's hiding in your pants, waiting to come out. (music) Listen to me, Chief, it's Pecker, it's coming. Pecker is getting bigger all the time and once it becomes big, it's going to be hard to stop it. Stop spanking the monkey, this is serious. This Pecker, he's dangerous. Arghh. Woody Woodpecker is back but this time he's really peeved. He's a peeved Pecker who had a piper pick. No, Pecker is coming. Whew. God, I'm lonely. Hey, what's that crawling up my pants? What is that? (music) Oh. Oh. (unintelligible) Oh, I just simply love cleansing myself. Oh, Jesus this is beautiful, au naturel, oh, I think I've dropped the soap. Let me bend over here. What's that? Something feels strange on my back. What is

that? (music) Oh. Oh. This Pecker is long and hard and waiting to pounce from the bush. This weekend, check it out.

Radio Station KSJO-FM, San Jose, CA

5. 10/27/88 7:00 - 8:00 a.m.

PS Contestant number two, you're on the air. Identify yourself.

CA I'm Eric.

PS Yes.

CA From Campbell.

PS Yes, Eric.

CA You know what relative humidity is?

PS Relative humidity? What?

CA It's the sweat running down your sister's back when you're doing her doggie style.

PS Ohhh.

6. 10/28/88 7:00 - 8:00 a.m.

PS Christian Blasey, the third. And classical music lovers, through this limited time offer, you can have the world's best loved classics performed by the original composers but with one exception, these true classics are performed in complete fellatio. You get Bach.

FV Ohh. Oh, yeah you're what I've been looking.

PS The immortal Chopin.

FV Oh. Oh. Oh. You like that baby, oh yeah.

PS Yes, these timeless classics are performed in true Dolby stereo with complete fellatio. You can surround your entire living room with fellatio movements. You and your family will lick their lips just waiting for fellatio. Order today and get a free Beethoven bib.

FV Oh, yeah, you really like that don't you baby.

Radio Station KSJO-FM, San Jose, CA

7. 10/31/88 9:00 - 10:00 a.m.

PS: Perry Stone

MV: Male Voice

FV: Female Voice

PS All right man. Thank you.

MV When you were born maybe your parents were just too lazy. Now that you're all grown up and you're a healthy American male you have to suffer the consequences.

FV Ohh, it's an uncircumsized one. Ohh, how gross.

MV Yes, over 65 million healthy American males suffer from uncircumsized ones. Unlike normal men, uncircumsized males have to constantly worry about pulling back their foreskins every time they have to use it. Now, you don't have to worry again because Rodgo proudly presents the foreskin garage opener. It's a computer chip that fits snugly on the tip of your thing and included is a remote control that you keep in your pocket. You use it just like a garage opener. Open it up when you have to use your thing. (Mechanical sound effect) Watch the foreskin get pulled back in a comfortable, relaxed fashion. Now, you're ready for some serious pounding. (Metal hammer sound effect) So, never worry again about foreskin. Pick up Rodgo's new foreskin garage opener. You'll be glad you did.

MV Oh, wow. I think she's ready to do it. Hey, you ready to do it? Yeah, I think she's ready to do it. (Mechanical sound effect)

FV Yeah. Oh, yeah, you are.

MV Thank you foreskin garage door opener.

8. 10/19/88 7:00 - 8:00a.m.

MV Oh, this one is for you Trish. If I had a rooster and you had a donkey and your donkey ate the feet off my rooster, what would you have?

TB I don't know. What would I have?

CA Two feet of my cock in your ass. (music payoff) (laughter)

PS Of course, we're speaking about those farm animals again, just so we can clear it up.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-352

In re Applications of	
WCVQ, INC.	File No. BPCT-871224KG
NICHOLS BROADCASTING CORPORATION	File No. BPCT-880301KF
MAPLE LEAF BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-880301KG
LAKE CHAMPLAIN COMMUNICATIONS, INC.	File No. BPCT-880301KH
BURLINGTON CHANNEL 44, INC.	File No. BPCT-880301KI
BURLINGTON 44 COMPANY	File No. BPCT-880301KL
DAVID McMEEKIN	File No. BPCT-880301KM
For Construction Permit for a New Television Station on Channel 44, Burlington, Vermont	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1990; Released: June 26, 1990

By the Commission: Commissioner Marshall not participating.

1. Before the Commission for consideration are a Review Board Memorandum Opinion and Order, *WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989); an Application for Review filed June 19, 1989 by WCVQ, Inc.; and an Opposition filed June 27, 1989 by Nichols Broadcasting Corporation.

2. Nichols Broadcasting proposes to integrate John C. Nichols, its sole principal, into the day-to-day operations of its proposed station as the full-time general manager. Based on that proposal, Nichols Broadcasting seeks 100 percent quantitative integration credit in this comparative licensing proceeding. It also seeks qualitative enhancement credit for Nichols' past broadcast experience.

3. During the evidentiary hearing, Nichols testified that he had been general manager and sales manager of radio station WXXX-FM at South Burlington, Vermont from November 1984 until April 1985. Tr. 384-86. He also testified that his employment at WXXX-FM fulfilled an integration pledge made by him in the comparative licensing proceeding for that station.[1] Thereafter, counsel for WCVQ questioned Nichols as to whether he had fulfilled his obligation to work 40 or more hours per week at WXXX-FM. Nichols testified that he had done so. He admitted that he had been fired as the general manager, but maintained that his termination was the result of the efforts of the other shareholders to acquire his equity in the station. Tr. 387, 412, 415. Counsel for WCVQ then sought to introduce rebuttal evidence -- one or more witnesses who were employed at WXXX-FM during Nichols' tenure and who, counsel contended, were prepared to testify both that Nichols did not work 40 hours per week at the station and that he was terminated because of his failure to fulfill his 40 hour integration commitment. Tr. 445-47.

4. The ALJ refused to allow the rebuttal testimony. Tr. 479. In a Memorandum Opinion and Order, *WCVQ, Inc.*, FCC 89M-965 (ALJ Mar. 24, 1989), he memorialized his bench ruling. The ALJ held that Nichols' integration pledge was not a basis for the Commission's decision to approve the WXXX-FM settlement and that, therefore, the integration pledge did not survive the settlement agreement. Hence, he concluded that WCVQ's witnesses would rebut nothing of which the Commission had a continuing interest under the standard comparative issue of this proceeding. However, he authorized WCVQ to file an interlocutory appeal of his ruling. He said that there was a question of law concerning whether a commitment made in the comparative context of a prior Commission proceeding can be terminated by settlement. In this regard, the ALJ noted that *Utah Television Associates Limited Partnership*, 102 FCC 2d 1470 (Rev. Bd. 1985), holds that applicants are expected to fulfill their comparative commitments, even after the settlement of a proceeding. In contrast to that holding, the ALJ noted that the Commission recently stated that it "does not use the comparative criteria to select permittees in settlement cases, [and] . . . cases . . . terminated by settlement . . . [are not] based on a comparative selection among competing applicants." *Notice of Proposed Rule Making*, (Lottery Rule Making) MM Docket 89-15, 4 FCC Rcd 2256, 2258 at ¶ 15 and 2266 at n. 12 (Mar. 10, 1989).

5. The Review Board affirmed the ALJ's ruling and denied WCVQ's appeal. *WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989). The Board found that *Utah Television Associates* no longer reflects Commission policy. It said that in *Ruarch Associates*, 103 FCC 2d 1178 (1986), the Commission revised its policy when it approved a settlement agreement and deleted a divestiture condition which had been placed on the grant of a license in that case. The Board also cited *Mark W. Wodlinger*, FCC 89I-04 (Gen. Counsel Jan. 10, 1989), where the General Counsel, acting pursuant to delegated authority, approved a settlement agreement which relieved the applicant of divestiture and integration commitments that had been made during the comparative hearing process.

6. In its application for review, WCVQ contends that the Board erred in holding that *Ruarch* and *Wodlinger* dictated the disposition of the issue presented on its appeal of the ALJ's ruling; *i.e.*, whether WCVQ should have been accorded the opportunity to rebut Nichols' testimony that he worked 40 or more hours managing station WXXX-FM. WCVQ also contends that both the ALJ and the Board confused its basic request to rebut Nichols'

testimony with the more complex policy question raised in *Ruarch* and *Wodlinger* – whether applicants are bound by representations made in comparative proceedings that have been resolved by settlement. WCVQ submits that the rulings below were inconsistent with well established Commission case law which holds that truthfulness and candor of an applicant's testimony are always at issue in a comparative proceeding.

7. For the reasons which follow, we shall grant WCVQ's application for review to the extent indicated herein, modify the Board's decision, and direct the ALJ to conduct further proceedings consistent with our holdings herein.

8. We find that WCVQ should have been accorded the opportunity to rebut Nichols' testimony regarding his prior employment at WXXX-FM, even without the specification of a misrepresentation and/or candor issue and despite the holding of *Ruarch*.[2] As WCVQ aptly points out, the truthfulness and candor of an applicant's testimony are always at issue in Commission proceedings. *William M. Rogers*, 92 FCC 2d 187, 199 (1982). Nichols testified that he worked 40 hours per week at WXXX-FM and WCVQ is entitled to an opportunity to test the veracity of that testimony.

9. Moreover, we further find that WCVQ's proffer of rebuttal evidence is also admissible and relevant under the standard comparative issue. Nichols Broadcasting claimed qualitative enhancement credit for past broadcast experience based on, among other things, Nichols' prior employment at WXXX-FM. (Nichols Broadcasting's Diversification and Integration Statement filed October 24, 1988.) Consequently, Nichols' subsequent hearing testimony regarding that employment was obviously put forth by that applicant to substantiate and strengthen its claimed entitlement to such an enhancement credit. Viewed in that perspective, we fail to see how WCVQ's rebuttal evidence proffered to diminish the significance of Nichols' employment at WXXX-FM would be any less relevant under the standard comparative issue of the case or of no interest to the Commission in resolving that issue, despite the ALJ's holdings to the contrary.

10. There is an additional matter in this regard which warrants brief mention. After the ALJ refused its proffer of rebuttal evidence, WCVQ sought the specification of a misrepresentation and/or candor issue. The ALJ denied that motion, finding that WCVQ failed to plead specific allegations of fact to support such an issue and that the opposition of Nichols Broadcasting to the motion contained a great body of material indicating the motion had no basis in fact; *i.e.*, affidavits from persons stating that Nichols did work full-time at WXXX-FM, as well as copies of some of the station's records which were submitted as a basis for corroborating those statements. FCC 89M-1264, released April 24, 1989. Relying on the foregoing, Nichols Broadcasting contends that it has been overwhelmingly demonstrated on the record that Nichols did indeed work more than 40 hours per week at WXXX-FM. (Opposition to Application for Review filed June 27, 1989.) We disagree. Without considering the merits of the ALJ's ruling concerning the requested misrepresentation and/or candor issue which is not now before us, we are not persuaded that those submissions warrant the evidentiary weight that Nichols Broadcasting attributes to them in the absence of being tested in the crucible of an evidentiary hearing.

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed June 19, 1989 by WCVQ, Inc. IS GRANTED to the extent indicated herein and in all other respects IS DENIED; that the Review Board's decision (4 FCC Rcd 4079, Rev. Bd. 1989) IS MODIFIED and that the ALJ IS DIRECTED to conduct further proceedings consistent with the holdings herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] That proceeding was terminated pursuant to a settlement agreement between the three competing applicants. Those applicants -- one of which was Nichols -- agreed to a three party merger whereby each obtained a one-third interest in a new entity which ultimately became the licensee of WXXX-FM. Pursuant to the applicants' merger agreement, Nichols agreed to work full-time at WXXX-FM, as the station's general manager and sales manager.

[2] In this regard, we wish to emphasize that the holding in *Ruarch* has not played any role in our determination in this case and that we have taken the policy questions implicated by *Ruarch* under advisement in our recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd _____ (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID ATLANTIC TELECOM, INC.,
Complainant,

v.

CHESAPEAKE AND POTOMAC TELEPHONE CO.,	File No. E-89-68
CHESAPEAKE AND POTOMAC TELEPHONE CO. OF MARYLAND, and	File No. E-89-69
CHESAPEAKE AND POTOMAC TELEPHONE CO. OF VIRGINIA, Defendants.	File No. E-89-70

ORDER

Adopted: June 20, 1990; Released: June 27, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 28, 1988, Mid Atlantic Telecom, Inc. ("MAT"), filed the above captioned formal complaints against Chesapeake and Potomac Telephone Co., Chesapeake and Potomac Telephone Co. of Maryland and Chesapeake and Potomac Telephone Co. of Virginia (collectively "C&P") alleging violations of Sections 201(b), 202(a) and 203(c)(1) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a) and 203(c)(1). In the complaints, MAT alleged that C&P overcharged complainant in the application of special access charges for voice grade circuit terminations, discriminated in making special access charges, and engaged in unreasonable practices in violation of the Communications Act. C&P denied the allegations raised in the complaints. By joint motion filed February 15, 1990, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that the complaints be dismissed with prejudice.

2. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 21, 1990

EXTENSION OF TIME FOR FILING FIRST QUARTER 1990 ARMIS REPORT 43-01

Section 43.22 of the Commission's Rules requires certain telephone companies to file quarterly reports (FCC Report 43-01) which provide operating data that the Commission requires to effectively administer its accounting, separations and access charge rules. The next quarterly report is due to be filed on June 30, 1990. On April 18, 1990, the Chief, Common Carrier Bureau, issued an *Order Inviting Comment* (5 FCC Rcd 2738) which proposed changes to the quarterly report. Because a final order containing the revised report will not be issued in sufficient time to allow the filing carriers to complete the report by the June 30 filing date, we are extending the deadline so that the data will be in the format to be prescribed. Accordingly, the filing date for the Quarterly Report for the first quarter of 1990 is extended to sixty (60) days from release of a final order in this matter for Tables I and II, and ninety (90) days from release of the final order for Table III.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

MARY R. KUPRIS, EXECUTRIX OF THE ESTATE OF ANTHONY C. KUPRIS
(Assignor)

and File No. BALCT-890511KF

WLOS TV, INC.

For Assignment of License for
Station WAXA-TV, Channel 40,
Anderson, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 12, 1990

By the Commission: Commissioner Duggan issuing a statement.

1. The Commission has before it for consideration (1) an application for consent to the assignment of license for station WAXA-TV (Independent, Channel 40), Anderson, South Carolina from Mary R. Kupris, Executrix of the Estate of Anthony C. Kupris (Assignor), to WLOS TV, Inc. (Assignee), licensee of station WLOS(TV) (ABC, Channel 13), Asheville, North Carolina;[1] (2) a petition to deny the assignment filed by Pegasus Broadcasting of Augusta, Georgia, Inc., (Pegasus), licensee of station WJBF(TV) (ABC, Channel 6), Augusta, Georgia; and (3) responsive pleadings.[2]

2. The acquisition of WAXA-TV by Assignee will result in an overlap of the station's predicted Grade B contour with that of WLOS(TV) in a manner inconsistent with section 73.3555(a)(3) of the Commission's Rules.[3] (In fact, the predicted Grade A contours of the two stations overlap.) However, Assignee proposes to operate WAXA-TV "primarily as a satellite"[4] of WLOS(TV) and requests that the assignment application be granted pursuant to the "satellite exception" provision to section 73.3555(a)(3), the Commission's contour overlap or duopoly rule for television stations.

3. In support of their request, the applicants state that WAXA-TV was acquired by assignment in October 1982 by Mark III Broadcasting Company, Inc. (Mark III). The station was off the air at that time. In 1984, after approximately five years of inactivity, WAXA-TV resumed broadcasting as an independent UHF television station licensed to Anderson, South Carolina (population 27,313), which is included in the Greenville-Spartanburg, South Carolina-Asheville, North Carolina market. Since its acquisition by Mark III, the Assignor asserts, WAXA-TV has sustained $5,964,000 in construction costs and $4,727,804 in operating losses for a total expenditure of approximately $10.7 million. Assignor states that financial statements of Mark III for WAXA-TV show that in the first six months of 1985, there was an operating loss of $805,521, and for the year ended December 31, 1986, an operating loss of $1,823,196. In 1986, WAXA-TV was offered for sale through a broker; however, no real interest was shown. For the years 1987 and 1988, Assignor represents that the internal financial accounting of Mark III shows cash losses of $238,520 and $477,456, respectively. WAXA-TV again was offered for sale through another media broker in early 1988. From February 1988 to April 1989, the broker solicited 66 prospective buyers of WAXA-TV, but to no avail. During this same period, Assignor states that negotiations were ongoing with the licensee of WLOS(TV) to purchase and operate WAXA-TV as a satellite.

4. In 1989, Mark III's sole principal, Anthony C. Kupris, died and the assets were transferred to Assignor as Executrix of the Estate of Anthony C. Kupris. To reduce costs, Assignor states that WAXA-TV changed to 90% barter programming, reduced its staff to a minimum, and ceased originating any local programming. Even with these measures, Assignor avers that WAXA-TV is still losing money, with actual operating expenses exceeding revenues by an average of $30,000 to $40,000 per month, thereby making operation of WAXA-TV as a stand-alone unprofitable. Assignor attributes the financial difficulties of WAXA-TV to its failure to compete effectively for advertisers with the two major network-affiliated television stations, as well as an independent station affiliated with Fox,[5] licensed to the Greenville-Spartanburg-Asheville market. In that regard, Assignee states that the Grade B contour of WAXA-TV does not cover the entire market or reach Asheville, whereas the Grade A contours of the stations encompass the three largest communities in the market, as well as Anderson. Accordingly, Assignor asserts that to avoid the inevitable loss of programming service and to ensure the continuation of the sole local television station licensed to Anderson,[6] WAXA-TV can only be operated as a satellite of WLOS(TV).

5. With respect to the contour overlap between WAXA-TV and WLOS(TV), an engineering study, conducted by an independent consulting firm, was submitted with the application. The study indicates that the predicted Grade B contour of WAXA-TV encompasses 5,995 square miles and a population of 952,066 persons. The study further indicates that the predicted Grade B contour of WLOS(TV) encompasses 17,816 square miles and a population of 2,171,573 persons. The overlap area between WAXA-TV and WLOS(TV) would encompass 4,360 square miles and 840,060 persons, which represents 73 percent of the area and 88 percent of the population within WAXA-TV's Grade B contour and 24 percent of the area and 39 percent of the population within WLOS(TV)'s Grade B contour. Assignee asserts, however, that these figures overstate the degree of actual overlap because they include areas where WLOS(TV)'s signal is subject to shadowing. Based on calculations excluding the shadowed areas, the study estimates the overlap to be 54 percent of the population and 52 percent of the area within WAXA-TV's Grade B contour and 28 percent of the population and 19 percent of the area within WLOS(TV)'s Grade B contour.

6. Within the overlapping contours of WAXA-TV and WLOS(TV), the Assignee alleges that 327,453 persons (15 percent of the total) in an area of 1,258 square miles (7.1 percent of the total) currently do not receive WLOS(TV)'s signal due to the shadowing caused by the effects of the

intervening mountainous terrain. Thus, Assignee asserts, an additional public interest benefit of allowing it to acquire WAXA-TV is an improvement of existing service for station WLOS(TV). In this regard, Assignee states that the WLOS(TV) transmitter is located in the mountains of Asheville on the northern fringe of the Greenville-Spartanburg-Asheville market and cannot reach Greenville and Spartanburg in the southern portion of the hyphenated market. Relocation of WLOS(TV)'s transmitter to the other side of the mountain is not possible, Assignee asserts, as WLOS(TV) would then be unable to serve Asheville, its community of license, with the required signal quality. However, Assignee notes that the other network affiliated stations licensed to the market are centrally located in Greenville and Spartanburg on flatter ground and provide predicted Grade A service to those communities as well as Asheville and Anderson because their signals are not affected by terrain. Despite its inferior service, Assignee notes that WLOS(TV) must still attract advertisers within the market and pay high programming costs.

7. In an effort to compensate for the alleged competitive imbalance in the Greenville-Spartanburg-Asheville market, Assignee states that WLOS(TV) relies on three television translator stations[7] to provide coverage to small areas within its shadowed territory. Assignee claims, however, that these translators are only partially effective in overcoming the shadowing of WLOS(TV)'s signal, which is random and widespread. To overcome this shadowing would require the construction of numerous additional translators, using many frequencies, at great expense resulting in an inefficient use of spectrum. Assignee specifically refers to its Greenville, South Carolina television translator's failure to provide the northeastern portion of that city with WLOS(TV) service as a practical example of translators not being entirely effective in resolving shadowing problems. Assignee also maintains that its use of on-channel boosters may slightly alleviate the shadowing, but would greatly aggravate the ghosting caused by the reflection of the WLOS(TV) signal in mountainous terrain. Further, utilizing cable is also not an option, as Assignee claims that cable penetration in the shadowed area is low, particularly in Pickens County, where Greenville is located, and Oconee County. However, Assignee claims that satellite operation of WAXA-TV would allow WLOS(TV) to increase its coverage in precisely the area currently unserved by WLOS(TV) without any loss of service. Assignee states that WAXA-TV would provide first off-the-air ABC network service to 22,939 persons within an area of 470 square miles. Thus, Assignee contends that the operation of WAXA-TV as a satellite is the most efficient means of providing ABC network service to a substantial number of potential viewers and improve the competitive position of WLOS(TV) to a level comparable to that of the other three television stations in the Greenville-Spartanburg-Asheville market. Finally, the applicants believe that a grant of the application will return some locally originated programming to WAXA-TV, which discontinued local originations due to the financial difficulties that finally forced the station off the air.

PETITION TO DENY

8. In its pleadings, Pegasus questions the economic showing submitted by Assignee in justification of its operation of WAXA-TV as a satellite of WLOS(TV) serving the Greenville-Spartanburg-Asheville market. Pegasus relies on industry statistics showing that the market is ranked as the 36th largest area of dominant influence (ADI), including 634,500 households served by 10 full-service television stations.[8] Industry economic projections, submitted by Pegasus for the market, reflect 1989 net television market revenues at $58,938,000. Within the market, Pegasus claims that WAXA-TV's Grade B contour totally encompasses Greenville, Spartanburg and Anderson counties, the first, second and fourth largest counties in the market with over 256,900 television households. The entire market has 634,500 television households. Pegasus maintains that the population in these three counties has increased 1.6 percent from 1985 to 1987; that the total personal income, for the same time period, has increased nearly 16 percent; and that unemployment for Greenville and Spartanburg is 3.5 percent and 4.0 percent, respectively, which is well below the national average. Pegasus also states that WAXA-TV's Grade B contour serves 952,066 persons, including Anderson County which has 55,100 ADI television households. According to Pegasus' analysis of WAXA-TV's performance since it commenced broadcasting in 1984, the station's operating margin has actually improved, reflecting a 73 percent increase from 1986 to 1989. Pegasus states that the foregoing economic conditions of the Greenville-Spartanburg-Asheville market do not reflect the dire circumstances previously deemed dispositive by the Commission in granting satellite operations in *B. G. S. Broadcasting, Inc.*, 2 FCC Rcd 107 (1987) and *Laurel Television, Inc.*, 59 RR 2d 1337 (1986), and, therefore, do not warrant grant of Assignee's satellite request.

9. Pegasus also disputes the degree of shadowing and television coverage within the overlap area of WAXA-TV's and WLOS(TV)'s predicted Grade B contours. Pegasus relies on the figures in its engineering statement which indicate that the shadowed portion of WLOS(TV)'s contour only encompasses an area of 875 square miles, reflecting an overlap area constituting 21.1 percent of the area within WLOS(TV)'s Grade B contour and 58.1 percent of the area within WAXA-TV's Grade B contour. Pegasus notes that Assignee failed to include in its calculations of the shadowed area, television translator stations licensed to WLOS(TV) which currently serve parts of the shadowed area, and the ten cable systems that serve shadowed and other areas. Pegasus further claims that its engineering statement shows significant shadowing of WAXA-TV's signal in portions of the area allegedly lacking ABC service where little or no shadowing of WLOS(TV)'s signal occurs. Pegasus concludes that WLOS(TV), not WAXA-TV, will be the primary source of ABC network service in those areas.

10. With respect to WLOS(TV)'s position in the Greenville-Spartanburg-Asheville market, Pegasus claims that the station is not subject to a competitive disadvantage. Pegasus notes that WLOS(TV) is primarily responsible for serving Asheville, its community of license, and has only a secondary obligation to serve surrounding areas in the market. Concerning those secondary markets, Pegasus relies on "net weekly circulation"[9] figures derived from the *1989 Television & Cable Factbook Stations Volume* for WLOS(TV), to rebut Assignee's claim that

WLOS(TV) is not widely viewed in the southern portion of the market. Specifically, Pegasus contends that, in parts of Union, Laurens, Abbeville, Greenwood, Elbert, Hart, Franklin, and Stephens counties, WLOS(TV) is carried on the basic tier by each cable system, and has a net weekly circulation of 50 percent or better. Pegasus also claims that, in the shadowed area encompassing Pickens, Greenville, Spartanburg, Anderson, and Oconee counties, WLOS(TV) received a net weekly circulation of 50 percent or better. In those remaining shadowed areas, Pegasus submits that Assignee could employ additional translators or on-channel boosters to further alleviate WLOS(TV)'s alleged coverage deficiencies. In support of its argument, Pegasus cites *tvUSA / Pueblo, Ltd.*, 4 FCC Rcd 598 (MMB 1989), where the Bureau denied the acquisition of an unbuilt station to be operated as a satellite because the applicant's proposed ownership of a second two full-service station in the same city, to alleviate shadowing problems, would reduce the number of additional voices in the market. Pegasus further notes that in *tvUSA / Pueblo* the staff recommended use of one or more television translators or on-channel boosters to provide improved service to areas suffering shadowing caused by mountainous terrain. Use of WAXA-TV as a satellite station, Pegasus maintains, will result in Assignee operating two full-service television stations in the Greenville-Spartanburg-Asheville market, and reduce the number of independent voices in the market. Pegasus, therefore, questions the benefits to be derived from the satellite operation of WAXA-TV, when WLOS(TV)'s alleged coverage deficiencies can be remedied by alternative video services.

11. In rebuttal to Pegasus' petition, Assignee first questions the validity of Pegasus' argument that WAXA-TV can survive independently as a full-service television station. To support that position, Assignee maintains that Pegasus is mistakenly citing Commission case precedent, which denied satellite requests, and that relied on general market statistics and projections for unbuilt stations with no established operating records. These cases, Assignee argues, are inapplicable to WAXA-TV's situation because its actual operating performance over a four-year period clearly shows that it cannot succeed in Anderson, South Carolina, and is requiring the licensee of WAXA-TV to sell it at a $8,500,000 loss. Assignee rejects Pegasus' suggestion that WLOS(TV) use additional television translator stations as a piecemeal solution resulting in an extremely inefficient use of the spectrum, and precluding WLOS(TV) from otherwise providing Anderson, South Carolina with local programming specifically directed toward the needs and interests of the residents of that area. To support its argument, Assignee relies on a declaration from James Conschafter (Conschafter), General Manager of WLOS(TV), and a Vice President of WLOS TV, Inc. Conschafter states that, although WLOS(TV) currently operates 21 television translator stations, including three in the shadowed area, they have not solved the shadowing problem. He reiterates Assignee's earlier representations that neither translators nor on-channel boosters will entirely solve the shadowing of WLOS(TV)'s signal. Assignee also states that, since the shadowing of the signals of WAXA-TV and WLOS(TV) occur in different places, the extent of the stations' overlap is reduced proportionately by that area where the WAXA-TV signal is shadowed. Assignee states that Pegasus' engineering statement documents the shadowed area to comprise 875 square miles but does not estimate the number of persons affected by the shadowing. Irrespective of the conflicting shadowing calculations, Assignee notes that Pegasus' engineering study still concedes shadowing within a substantial portion of the overlap area.

12. Assignee further reasons that Pegasus' allegations, questioning WLOS(TV)'s signal problems and resulting competitive disadvantage, are irrational as they erroneously imply that WLOS(TV) is purchasing WAXA-TV for $2,000,000 merely to duplicate WLOS(TV)'s signal in an area it already adequately serves. In that regard, Assignee notes that Conschafter reviewed an analysis comparing both WLOS(TV)'s and WAXA-TV's picture quality in and around Greenville, South Carolina, and concluded that WAXA-TV would provide service to areas suffering from low signal level caused by terrain shielding, and to areas suffering from severe ghosting. Conschafter represents that the results of this analysis convinced WLOS TV, Inc. to acquire WAXA-TV. Assignee further states that the "net weekly circulation" figures relied on by Pegasus do not measure the adequacy or strength of WLOS(TV)'s signal, but merely reflect what percentage of television households in an area, viewed WLOS(TV) at least once in the recorded week.

DISCUSSION

13. The goals of our multiple-ownership rules are to promote economic competition and diversity of programming viewpoints. *See, e.g., Multiple-Ownership of Standard, FM and Television Stations*, 45 F.C.C. 1476, 1476-77, *reconsideration denied*, 45 F.C.C. 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 to section 73.3555 of the Rules. What constitutes a sufficient good cause showing for an exception to the duopoly rule for a satellite operation is not established by rule, however, and has evolved by case law. Generally, we can state that the greater the degree of overlap, the greater the adverse effect on the policies underlying the multiple-ownership rules. Further, the greater the overlap, the "less efficient use of the spectrum is involved [because] the same programming is received from two sources in the overlap area . . . ." *Television Satellite Stations (NPRM)*, 2 F.C.C. Rcd. 1359, 1362 (1987).

14. As noted in paragraph five, there is very substantial overlap in this case. The overlap area constitutes 73 percent of the area and 88 percent of the population within station WAXA-TV's predicted Grade B contour. The applicants, however, allege that the degree of overlap is lessened by rough terrain. They state that 54 percent of the population and 52 percent of the area within station WAXA-TV's Grade B contour would actually receive duplicated service. Pegasus alleges that the degree of shadowing is not as severe as computed by the applicants, but we need not decide which estimate is the more accurate. Accepting for the purposes of this ruling the figures computed by the applicants, there would still be substantial overlap between the parent and its proposed satellite.

15. We have reviewed those cases in which we have authorized satellite operations. We recognize that there are a few cases in which we have authorized satellites with substantial overlap with their parents.[10] For the most part, those cases can be distinguished on their facts from the

case before us here, but we do not believe that such an analysis is warranted. This case raises some very basic questions about our satellite policies that cannot be put off, consistent with our public interest obligations, until the completion of the Rule Making proceeding in *Television Satellite Stations*, 2 F.C.C. Rcd. 1359 (1987). As an interim measure, we believe we should refocus the nature of our inquiry on two elements when acting on requests for satellite status. First, we believe that we should not lose sight of the limited basis for creating the satellite exception in the first instance; that is, to provide service to unserved or underserved areas. Second, the multiple-ownership rules promote efficient spectrum use, and the policies of programming diversity and economic competition. That is particularly true for stations in the same service, as here. These policies should not be avoided by liberal grants of satellite exceptions. Thus, while gains to unserved or underserved areas will be considered, they must be weighed against the principles the rules are designed to protect. In evaluating satellite requests, and pending completion of the Rule Making proceeding, we shall focus on the balance of these competing concerns.

16. Other factors that have been considered in the past will continue to be weighed in the balance, particularly in close cases, but we shall afford them significantly less importance. We also observe that the Commission in many areas seeks to encourage competition, in place of government regulation, as a better means of serving the public interest. Under such a regulatory regimen, the fact that the marketplace causes financial distress for some licensees does not dictate that rules and policies should necessarily be waived in order to assist those licensees. The public interest may also be served by permitting other applicants, which comply with our rules and policies, to try to establish an economically viable operation or, if the frequency lies fallow, to reallocate the channel for other uses.

17. In this case, using either predicted or the applicants' estimated actual Grade B service, there will be very substantial overlap. Moreover, there are ten stations licensed to cities in that market (six commercial and four noncommercial), six of which place at least Grade B service over Anderson,[11] and five of those six provide predicted Grade A service. There are numerous television translator stations located within the market, at least 21 of which are licensed to the Assignee, and some of which serve the shadowed areas.[12] We do not believe that the market generally or Anderson specifically qualifies as "underserved," based on the information provided by the applicants. In these circumstances, the very significant spectrum inefficiency due to the large areas of signal duplication presented by the applicants' request is simply not outweighed by the service needs of the area.

18. Other matters alleged by the applicants warrant brief comment. We recognize that off-the-air reception is often degraded, but not necessarily lost, where terrain is rough. We further recognize that if the application were granted, WLOS(TV)'s somewhat terrain-limited reception would be improved via the proposed satellite in the southern portions of its market, which is farther from its transmitter. Compared to its CBS and NBC competitors, WLOS(TV) does not serve the southern portions of its market due to its more northerly transmitter location. Nonetheless, the Assignee is a network affiliated VHF television station in the 36th largest market. It alleges that its competitive position would improve with a grant of the application via-a-vis its NBC and CBS counterparts, but does not allege that it is itself in financial difficulty. Further, spacing requirements and differences in power, tower height, frequency, transmitter location and terrain make strict competitive equality among all licensees nearly impossible. Those differences do not support waivers of rules and policies based on that reason alone.

19. We have also considered the applicants' contention that almost 23,000 persons in an area of 470 square miles would receive a first off-the-air ABC service in the event of a grant of the application. There are, however, cable television systems operating in that area, as well as television translator stations, at least three of which are licensed to the Assignee. We note that the area that would assertedly receive a first ABC service includes parts of five counties; Abbeville, Elbert, Laurens, Newberry and Union. WLOS(TV) has a net weekly circulation in excess of 50 percent in those counties, except for Newberry, where its circulation is listed as between 25 and 49 percent by Arbitron. We agree with the applicants that net weekly circulation may not be the best indicator of viewership, but those figures do indicate that WLOS(TV)'s signal is available to many of the area's residents.

20. In sum, we do not believe that the modest improvements described by the applicants outweigh the very significant public interest detriments that would follow from a grant of this application. We therefore conclude that the applicants have failed to show that a grant of the satellite authorization would serve the public interest.

21. Accordingly, IT IS ORDERED, That the petition to deny filed by Pegasus Broadcasting of Georgia, Inc., IS GRANTED, and that the application (BALCT-890511KF) by which WLOS TV, Inc. seeks to acquire the license of station WAXA-TV, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pappas Telecasting of the Carolinas, Inc., licensee of station WHNS(TV), Asheville, North Carolina and Harry J. Pappas, permittee of station WHST(TV), Greenwood, South Carolina filed joint comments in support of WLOS TV, Inc.'s request for waiver and grant of application.

[2] As a preliminary matter, we have considered the allegation of economic injury to WJBF(TV) caused by its direct competition with the operation of WAXA-TV as a satellite station of WLOS(TV), and have determined that Pegasus has standing in this proceeding. *See FCC v. Sanders Bros. Radio*, 309 U.S. 470 (1940).

[3] Section 73.3555(a)(3) of the Commission's Rules provides that "no license for a television broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates or controls one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations . . . ." However, Note 5 to section 73.3555 states that "paragraphs (a) through (d) of this Section will not be applied to cases involving television stations which are primarily 'satellite' operations,"

and "such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

[4] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programming but produces less than five percent of its programming locally. *See, e.g., Amaturo Group, Inc.*, 68 FCC 2d 899 (1978).

[5] These stations are WSPA-TV (CBS, Channel 7); WYFF-TV (NBC, Channel 4); and WHNS(TV) (Fox, Channel 21)

[6] On July 3, 1989, Assignor informed the Commission that the operation of WAXA-TV would be discontinued on August 31, 1989. The station has, in fact, ceased broadcasting.

[7] According to Commission records, the television translator stations licensed to WLOS(TV) are W02AQ, Greenville, South Carolina, W11AP, Spartanburg, South Carolina, and W05AC, Tryon-Columbus, North Carolina.

[8] In addition to WLOS(TV), these stations are WYFF-TV, Greenville, South Carolina; WSPA-TV, Spartanburg, South Carolina; WGGS-TV, Greenville, South Carolina; WHNS(TV), Asheville, North Carolina; WASV-TV, Asheville, North Carolina; WNTV(TV), Greenville, South Carolina; WUNF-TV, Asheville, North Carolina; WNEH(TV), Greenwood, South Carolina; and WRET-TV, Spartanburg, South Carolina.

[9] Net weekly circulation is an estimate of the number of unduplicated television households which viewed a station at least once during the week.

[10] One such decision is *B. G. S. Broadcasting, Inc.*, 2 F.C.C. Rcd. 107 (1987), where the overlap area constituted 41 percent of the total area and encompassed 58.2 percent of the population within the proposed satellite's Grade B contour. Our decision in *Pete J. Stathakas*, 59 R.R.2d 169 (1985), *reconsideration denied*, 60 R.R.2d 1293 (1986), is more typical of our satellite cases, with reference to the degree of overlap. There, the overlap area constituted 23.7 percent of the area and encompassed 36.6 percent of the population within the proposed satellite's Grade B contour.

[11] The applicants also state that there are at least 12 commercial television stations located in other markets that provide Grade B service to at least parts of the proposed WLOS(TV)/WAXA-TV overlap area.

[12] The applicants have not provided specific information as to the extent to which persons residing in the shadowed area have available WLOS(TV)'s or ABC's programs from translators or cable television systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal Nos. 2071, 2212

Revisions to Tariff F.C.C. No. 1 & 2

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1990; **Released: June 8, 1990**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed the above-captioned tariff revisions on January 29, 1990. These revisions would establish a pricing plan that provides Software Defined Network (SDN) customers with additional discounts for their eligible AT&T SDN and 800 Service traffic. MCI Telecommunications Corporation (MCI) and US Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject or suspend and investigate the tariff and National Telecommunications Network (NTN) filed a petition to reject. AT&T replied. For the reasons discussed below, we reject this AT&T transmittal.

II. BACKGROUND

2. AT&T's SDN tariff currently contains volume-based discount schedules called Expanded Volume Plans (EVP). The revisions in Transmittal 2071 permit customers to combine their eligible[1] 800 service usage with their SDN usage to meet minimum traffic volume criteria and so qualify for the higher percentage discounts accorded higher traffic volumes under the various SDN EVPs. The discount would then apply to the rates for both services, but the discount applicable to 800 usage is capped to limit the amount by which the discount exceeds the discount already available in the 800 tariff.

III. PLEADINGS

A. Transmittal 2071

3. AT&T states that the plan is being offered to meet customers' demand for discounts on their total switched usage, and that competitors already offer price reductions for 800-like services to customers of their outbound SDN-like services. AT&T says that the availability of separate discount schedules does not meet the demand for a comprehensive discount. AT&T contends that it has suffered considerable competitive losses and that, although lower prices for outbound and inbound services will remain available from other carriers, this plan will help AT&T retain business, attract new customers, and improve profitability. Transmittal 2071 Description and Justification at 1-3.

4. AT&T asserts that the rates in Transmittal 2071 are justified by competitive necessity, invoking the Commission's explanation of the competitive necessity doctrine in the *Rate Structure and Volume Discount Order*.[2] The first element of proof recited there, AT&T argues, requires that a carrier's volume discount do no more than meet the competition. AT&T argues that, in this case, equal or lower priced services are generally available to customers. The second element of the competitive necessity test requires that the terms of the discounted offering meet competition without undue discrimination. AT&T argues that its pricing plan satisfies this requirement because it contains no restrictions on resale or sharing. Therefore, AT&T argues, all customers may take advantage of the plan. This limits AT&T's ability to establish unjustly discriminatory rates, according to AT&T. *Id.* at 15-16. Finally, the competitive necessity test requires that the discount contribute to reasonable rates and efficient services for all users. AT&T argues that this filing does so by allowing the company to keep business that it would otherwise lose, at rates that cover all relevant costs. AT&T says it will retain $17.7 million in 1990 revenues that would otherwise be lost, resulting in net earnings $1.4 million higher. *Id.* at 16.

5. Because these revisions do not eliminate any of the discounts already in the tariffs, AT&T treats this filing as a "new" service under the price cap rules. Under those rules, a "new" service is supported by a net revenue showing and is not factored into the indices for the basket(s) involved until the service has been in effect for one year. AT&T argues that the service passes the net revenue test. AT&T says that its net revenues for services subject to price cap regulation will increase on a cumulative present value basis within the 36-month period from the effective date of the new plan. *Id.* at 21-23.

B. Petitions

6. Sprint argues that this transmittal is a reprice of existing service, and not a new service, and as such is not in compliance with the price cap rules. Sprint Petition at 2-4. Sprint also maintains that the combination of 800 Service and SDN discounts outside the price cap framework violates the Commission's intent in creating a separate 800 Service basket in the price cap rules. *Id.* In addition, Sprint argues that the plan discriminates unreasonably between 800 Service customers who use SDN and those who do not and between SDN customers who use 800 Service and those who do not. Sprint says that this discrimination is unjust and anticompetitive because of AT&T's market power in 800 Service and its status as a dominant carrier. Sprint also argues that this AT&T offering will adversely affect the competitive market even after number portability for 800 service becomes available, because of the nonrecurring charges associated with SDN. *Id.* at 5-7.

7. Sprint further attacks AT&T's competitive necessity argument because, according to Sprint, AT&T is beating rather than meeting competition. Sprint argues that while AT&T does face "direct competition" in 800 Service, that competition is not equal due to the absence of number portability, and states that AT&T retains over 80 percent of the 800 Service market. *Id.* at 7-9. Sprint finally maintains that AT&T's financial data are deficient, and that the service may not be compensatory. *Id.* at 10-12.

8. MCI argues that AT&T is leveraging its dominant 800 Service to sell its competitively vulnerable SDN service. MCI argues that the plan is an unjust and unreasonable practice and, therefore, a violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). MCI analogizes this linkage of discounts for multiple services to the tying of 0+ commissions and 1+ service presubscription which the Bureau found unlawful.[3] MCI claims that it is unlawful under Section 201(b) of the Communications Act, as well as underlying antitrust principles, for AT&T to leverage a dominant service to sell a more competitive offering. MCI Petition at 3-6. MCI further states that AT&T's market power in 800 Service is "incontrovertible," even though other carriers have been in the market since 1987, and that the nonportability of 800 Service telephone numbers prevents customers from moving to MCI's service. *Id.* at 6-8.

9. NTN states that AT&T is attempting to subvert both the price cap rules and the Commission's Rule Making assessing competition in the interexchange market. NTN maintains that price cap regulation is meaningless if AT&T is allowed to ignore baskets and to bundle services across basket lines. According to NTN, AT&T is proposing exactly what the baskets are meant to prevent, leveraging the 800 Service offering to block competition in other services. NTN Petition at 1-3. NTN also accuses AT&T of subverting the Commission's price floor regulations. NTN says that AT&T is in effect implementing a deeper discount for SDN services by applying the discount to the aggregate demand. By calling it a new service, NTN alleges that AT&T avoids applying price floors to the SDN discount, when SDN already has the lowest index value of all AT&T's services. NTN argues that the new discounts would likely fall far beyond the band floor. *Id.* at 3-4.

10. NTN further contends that AT&T's claim of competitive necessity conflicts with the price cap decision, and prejudices the outcome of the interexchange proceeding. NTN states that AT&T's contention that there is substantial competition in the 800 Service market, without attempting to show that conditions have changed since the price cap decision less than 10 months ago, is a back door attempt to challenge the price cap decision, and, in any event, is not credible. *Id.* at 4-6. Finally, NTN claims that AT&T has not supported the need for combining SDN and 800 Service into one discount structure. *Id.* at 7.

C. AT&T Reply

11. AT&T asserts that its plan has no effect whatever on the separate availability of 800 Service and SDN, and therefore no illegal tie-in or leverage arises. AT&T argues that if it had the market power in 800 Service asserted by petitioners, it would make no economic sense for AT&T to lower its prices for 800 Service as proposed in this filing. AT&T notes that it has repeatedly reduced 800 Service prices in recent years, and that it "neither controls entry nor price for 800 Services." AT&T asserts that it does not possess any market power over these offerings that could be used as leverage in the outbound market. AT&T Reply at 6-8. AT&T further says that number portability is a "red herring" issue, and asserts that even a customer who chooses to receive its 800 Service from AT&T can obtain its SDN services from another carrier -- at combined prices that are still less than the proposed plan. AT&T maintains, in any case, that there is no evidence that the lack of number portability has lessened competition in 800 Service. AT&T asserts that only a small number of customers have "vanity" numbers,[4] and that many customers actually have vanity numbers from other interexchange carriers.

12. AT&T further asserts that equal or lower price alternatives to its pricing plan are available. It specifically cites US Sprint's VPN/800 discount plan, under which the service fee for the Network WATS discount is waived for VPN customers and 800 usage is included in calculating VPN discounts. *Id.* at 12-16. AT&T also contends that there is no undue discrimination because the offering satisfies the net revenue test, and the plan is generally available with no restrictions on resale or sharing. *Id.* at 17-18.

13. AT&T next argues that its linked discounts properly constitute a new service. AT&T cites the price cap decision as stating that new services need not present new technologies or new functional capabilities, but may be repriced versions of existing services as long as the previous version of the service still exists. *Id.* at 19-21. AT&T further maintains that there is nothing in the price cap rules to preclude the combination of services from different baskets under a single offering, and that the net revenue test satisfies the concerns of predation and cross-subsidy. AT&T also alleges that if it did apply the reprice effect of the plan to respective SDN and 800 Service indices, none of the 800 Service indices would fall below the floor for each respective band, and the SDN revenues would in all events exceed the average variable costs of that service. Moreover, AT&T claims that competitive necessity arguments are still available and valid under price caps. *Id.* at 23-24.

14. Finally, AT&T asserts that there are no defects in its cost analysis. AT&T says that it did account for cross-elastic effects and that its declining expense ratios are explained by customer migration to lower cost services over time. AT&T also explains the disparity between the costs quoted to state governments and the costs quoted here as attributable to different usage patterns, call characteristics, and the inclusion of dedicated access portions. *Id.* at 24-26.

IV. DISCUSSION

15. We reject this transmittal on the grounds that AT&T is engaging in an unreasonable practice under Section 201(b) of the Act, by conditioning the availability of the 800 service discount upon a customer's use of AT&T's SDN service.

16. AT&T's Expanded Volume Plan conditions the availability of an incremental 800 discount upon a customer's use of AT&T's SDN service, and vice versa. AT&T argues that this combined discount does not constitute a classic product tie-in, under which a company withholds a monopoly product unless the customer purchases a competitive product.[5] Under Transmittal 2071, AT&T states, customers not only have competitive options in both markets but can continue to take AT&T's 800 and SDN service at the existing rates. Moreover, AT&T is proposing to lower its rates for the very service in which supposedly it is dominant. AT&T asserts that the discount for 800 service is *de minimis* and claims that the filing is most accurately understood as a discount on its SDN service. Thus, by AT&T's view, Transmittal 2071 does not

capitalize on AT&T's 800 market power to force customer choices but simply rewards an 800 customer for selecting SDN service by lowering the rates for SDN.

17. We reject AT&T's characterization of its filing. The Commission has previously determined that the 800 Service market is less competitive than other interexchange service markets. In the *Price Cap Order*,[6] the Commission noted that substantial barriers to entry exist in the 800 Service market that impede competitive provision of that service:

> The provision of 800 Service presents particular difficulties because special number translation functions are necessary -- 800 Service numbers are not "ordinary" numbers. Local exchange carriers currently screen the first six digits of an 800 Service number (800 NXX) and send the call to the carrier to which that NXX is assigned. Because NXXs are assigned to particular carriers, an 800 Service subscriber cannot change interexchange carriers without changing its 800 Service number. In addition, subscribers are limited in their choice of 800 Service numbers to numbers beginning with NXXs reserved for their carrier.

4 FCC Rcd at 3063 (notes omitted). Because the Commission was uncertain when LEC measures to mitigate or eliminate these structural barriers would be implemented, and had not determined whether it should impose regulations on local access for 800 Service toward the same end, it established a separate 800 Service basket. One effect of the separate basket was to guarantee that AT&T's 800 Services would receive their share, and only their share, of reductions in switched and special access charges:

> This responds to concerns that access charge changes might be misallocated because some services are more competitive than others, and AT&T might flow through reductions disproportionately to services for which it faces the most competition. By placing the less competitive business services -- the 800 services -- in a separate basket, we have minimized the possibility of misallocation.

4 FCC Rcd at 3064.[7] The Commission's subsequent Notice of Proposed Rule Making in the *IC Rule Making* [8] noted the determination to place 800 Services in a separate price cap basket to recognize the unique structural barriers to competition. 5 FCC Rcd 2631. In the *IC Rule Making NPRM*, the Commission tentatively found that AT&T's business offerings other than 800 services are subject to vigorous competition, and proposed to apply maximum streamlined regulation to these business services. *IC Rule Making NPRM*, 5 FCC Rcd at 2640. However, the Commission stated that, while 800 Services are similar to business services as a whole and would tend to be characterized by a high level of competition, the fact that 800 numbers are not yet "portable" reduces the competitiveness of 800 Services:

> . . . the fact that 800 numbers are today not "portable" reduces the competitiveness of the provision of 800 services . . . .This means that 800 subscribers cannot change carriers without also changing their 800 number. It also means that prospective subscribers that seek to use a particular 800 number (for example, a number that spells their name or product) must take their 800 service from a particular 800 carrier . . . .
>
> The lack of number portability for 800 numbers appears today to remain a barrier to full competition in the 800 market. Some of the largest 800 customers use verbally significant 800 numbers or invest substantially in marketing their 800 numbers. The lack of number portability significantly limits the ability of these customers to respond to price and service changes in the 800 market. This limitation exists with respect to all 800 customers, regardless of their carrier, but may bestow an undue advantage on AT&T, which still provides more than 80% of all interstate 800 services. In addition, AT&T's large embedded customer base enables it to offer prospective 800 customers a greater choice of 800 numbers than other IXCs and therefore may give it an advantage over other IXCs in competing for new customers.

IC Rule Making, 5 FCC Rcd at 2635-36. The Commission therefore tentatively concluded that the maximum streamlined regulation proposed for other business services be extended to 800 Services only when 800 numbers become portable. *Id.* at 2641.

18. The Common Carrier Bureau has considered the lawfulness of such leveraging between services with distinctive competitive characteristics under Section 201(b) of the Communications Act. In the *Private Payphone Commission* order, *supra* n.3, the Bureau concluded that leveraging significant competitive advantage in one service to gain an advantage in another is an unreasonable practice under Section 201(b).

19. The Bureau examined an AT&T plan to pay commissions to private payphone companies for 0+ calls (collect calls, calls billed to third telephone numbers, and calls billed to calling cards). In return, the private payphone company was required to designate AT&T as the primary interexchange carrier (PIC) for all 1+ and 0+ interLATA calls. The Bureau concluded that AT&T was using the 0+ commissions and its significant competitive advantage in the 0+ market as leverage in the 1+ market.[9] The Bureau determined that AT&T's conduct had "significant enough anticompetitive consequences to find an unreasonable practice".[10]

20. Under this analysis, if AT&T has a significant competitive advantage in the 800 market, the leveraging in Transmittal 2071 violates § 201(b). While AT&T's Expanded Volume Plan offering may not involve a classic product tie-in, the transmittal nonetheless imposes a penalty: the application of the higher existing rate for 800 service unless the 800 customer agrees to take AT&T's SDN. By linking the availability of the 800 Service discount to a customer's selection of AT&T as its SDN carrier, AT&T is leveraging its significant advantage in the 800 market to gain a competitive advantage in the SDN market.

21. Thus, AT&T's assertion that it does not have significant competitive advantage in the 800 Services market conflicts with the tentative finding adopted by the Commission a few weeks ago in the *IC Rule Making*, and with last year's *Price Cap Order*. Our analysis of this transmittal must be based upon the assumption that the Commis-

sion's current determinations are correct. We therefore conclude that AT&T retains sufficient competitive advantage in the provision of 800 Service to render the instant transmittal patently unlawful under Section 201(b).

V. CONCLUSION AND ORDERING CLAUSES

22. For the reasons stated above, we conclude that the tariff revisions in Transmittal No. 2071 are patently unlawful because they violate Section 201(b) of the Communications Act, 47 U.S.C. Section 201(b). We therefore reject Transmittal No. 2071.

23. Accordingly, IT IS ORDERED that pursuant to Section 201(b) of the Communications Act, 47 U.S.C. Section 201(b), AT&T Communications Tariff F.C.C. Nos. 1 & 2, Transmittal No. 2071, IS REJECTED.

24. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Tariff F.C.C. Nos. 1 & 2, Transmittal No. 2071, filed by MCI Telecommunications Corporation, the National Telecommunications Network, and US Sprint Communications Company Limited Partnership, ARE GRANTED.

25. IT IS FURTHER ORDERED that AT&T Communications SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

26. IT IS FURTHER ORDERED that Special Permission No. 90-556 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. Sections 61.58, 61.59, are waived for the purposes of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] "Eligible" 800 traffic is 800 Service, Megacom 800 Service, and 800 ReadyLine Service traffic.

[2] *Private Line Rate Structure and Volume Discount Practices*,97 FCC 2d 923, 948 (1984) (*Rate Structure and Volume Discount Order*).

[3] AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834 (1988) (*Private Payphone Commission*).

[4] This term refers to 800 numbers selected with an eye to distinctive, usually mnemonic, translations for the number chosen.

[5] *See, e.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 at 1223-24 (3d Cir. 1976), *cert. denied*, 429 U.S. 823, 97 S. Ct. 74 (1976).

[6] Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3053, 3063-64 (1989) (*Price Cap Order*).

[7] The *Price Cap Order* also concluded that certain structural barriers also limit competition in the area of operator services and credit cards, specifically the absence of equal access for public telephones. *Price Cap Order*, 4 FCC Rcd at 3058.

[8] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 5 FCC Rcd 2627 (1990) (*IC Rulemaking* NPRM).

[9] 3 FCC Rcd at 5837.

[10] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-538

In re Applications of

SARASOTA-CHARLOTTE BROADCASTING CORPORATION	File No. BPH-870908MX
CAWLEY BROADCASTING CORPORATION, INC.	File No. BPH-870910MM
ENGLEWOOD RADIO, INC.	File No. BPH-870910NS
SANDPIPER BROADCASTING, INC.	File No. BPH-870910OG

For Construction Permit for
New FM Station, Channel 290A,
Englewood, Florida

Appearances

Vincent A. Pepper, *Neal J. Friedman* and *Howard J. Barr*, on behalf of Sarasota-Charlotte Broadcasting Corporation; *Harry F. Cole*, on behalf of Cawley Broadcasting Corporation, Inc.; *John D. Pellegrin*, on behalf of Englewood Radio, Inc.; *Alan C. Campbell*, and *Peter H. Doyle*, on behalf of Sandpiper Broadcasting, Inc.; and *Robert Zauner*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 18, 1990; Released: June 27, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. Four applicants remain in this comparative licensing proceeding for authority to construct a new commercial FM broadcast station on Channel 290A at Englewood, Florida. The case was tried on the standard comparative issue before Administrative Law Judge Walter C. Miller (ALJ), who concluded that a grant of the application of Sandpiper Broadcasting, Inc. (Sandpiper) would offer the best practicable service to Englewood. *Initial Decision*, 4 FCC Rcd 8106 (1989) (*I. D.*). The proceeding is now before the Review Board on exceptions filed by Sarasota-Charlotte Broadcasting Corporation (SCBC), Cawley Broadcasting Corporation, Inc. (Cawley), Englewood Radio, Inc. (ERI), the Mass Media Bureau (Bureau), and Sandpiper. Based on our review of the *I. D.* in light of the exceptions and replies, oral argument held May 4, 1990, and our examination of the record, we adopt the ALJ's findings of fact, except as modified below, and affirm his conclusion that a grant of Sandpiper's application would best serve the public interest. *See* below, para. 18.

BACKGROUND

2. This case turns on whether the ALJ erred in his evaluation of the applicants' respective comparative proposals using the criteria set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Initially, he charged SCBC with a "decisional and decisive" diversification demerit, after attributing to it its AM daytime-only facility, WENG (AM), located in the proposed community of license. *I. D. Conclus.*, para. 3. SCBC pledged to divest itself of that facility to garner a "daytimer" preference, *see Second Report and Order, FM Broadcast Assignments*, 101 FCC 2d 638 (1985), *recon. denied*, 59 RR 2d 1221 (1986), *further recon. denied*, 2 FCC Rcd 481 (1987), *aff'd sub nom. National Black Media Coalition v. FCC*, 822 F. 2d 277 (2nd Cir. 1988), but its pledge was discounted following the rejection of its written direct comparative case due to a variance between its hearing exhibits and application. None of the other applicants in this case was attributed with outside media interests. *Id.* SCBC's proposal to integrate its 90.2% owner into station operations was similarly discounted due to the variance, as was ERI's claimed integration proposal (*i. e.*, 50%), based on a putative failure of proof concerning its effectuation. *Id.*, *Findings*, paras. 25-26, 39.

3. Conversely, the ALJ awarded both Sandpiper and Cawley full quantitative integration credit. *I. D. Conclus.*, para. 7. As between those two, the ALJ declared:

> Since both Cawley and [Sandpiper] are entitled to 100% quantitative integration, we must examine the quality of their claims. Here [Sandpiper] is entitled to a *substantial* preference over Cawley. [Sandpiper] has put forward a firm, well-reasoned, and stable integration structure. Cawley's, on the other hand, reeks of impermanence and instability. Cawley's "trafficking" propensities clearly demonstrate that he will not become a *permanent* resident of Englewood; rather the record evidence points to the conclusion that Gus Cawley intends to speculate in the public domain. This isn't the type of integration that leads one to believe that Cawley will offer the best practicable service to the public.
>
> Neither the Pipers nor Cawley are *local residents* although both applicants say they will move to Englewood, and establish a *permanent* residence there. There is no reason to doubt John and Patricia Piper's promise on this score. But there is substantial reason to doubt Cawley's.
>
> Neither applicant can claim any advantage for *civic participation* or *auxiliary power*. The Pipers appear to have the edge in *education and business experience*. There isn't a lot to evaluate when it come to *broadcast experience*. Gus Cawley has fourteen years

of "trafficking" experience, while Patricia Piper's 6 years of broadcast experience has been almost exclusively in sales.

All in all, the quality of Sandpiper's integration claim is substantially superior to Cawley's.

Criterion 4 : Minority and Female Enhancement. Here again, Sandpiper's proposal is *clearly* superior to Cawley's. Gus Cawley owns 100% of Cawley's stock. He is a white non-hispanic male. Therefore, his quantitative and qualitative integration is not enhanced one bit. On the other hand, Sandpiper's quantitative and qualitative integration is enhanced by 50% voting stockholder Patricia Piper's credit for being a white non-hispanic female.

I. D. Conclus., at paras. 8-12. (Emphases in original; paragraph citations omitted.)

4. Sandpiper (and ERI) were also awarded moderate coverage preferences over Cawley for proposing to serve larger populations (*i.e.*, 68,823 and 65,080 vs. 35,605). *Id.*, *Findings*, para. 22; *Conclus.* paras. 5-6. However, *Newton Television Limited*, FCC 90-160, released April 27, 1990, paras. 6-7, is controlling and none of the applicants in this case is entitled to a coverage preference. That is, the coverage proposals were comparable prior to the comparative cut-off date, and any upgrade in the signal coverage differences occurred as a result of post-comparative cut-off date amendments. Also, ERI's exception as to the denial of its 50% integration proposal need not be considered because ERI cannot prevail in light our affirmance of 100% integration credit to Sandpiper and Cawley, *see* below, para. 18, even if its integration claim is credited, *see New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981) (qualitative attributes of integrated owners may increase or enhance value of integration proposal but may not overcome a clear quantitative difference (*i.e.*, 12.5%)) (subsequent history omitted), *see also Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-5066 (1989). *See* 47 CFR §1.282(b). We now turn to SCBC's variance exception.

SCBC

5. In the Equal Employment Opportunity (EEO) Form (FCC Form 396-A) submitted with its application, SCBC specified that Kent Higgins would be the station's proposed general manager and the individual responsible for implementing SCBC's EEO program. Subsequently, in a post-designation amendment to its application, filed December 30, 1988, SCBC identified Lowell Thomas as its general manager and responsible EEO official. However, on January 4, 1989 (the ALJ-prescribed deadline for the filing of Integration and Diversification Statements), SCBC there represented, for the first time, that E.J. "Ted" Ewing would be integrated at the station as general manager. Ewing is president and a 90.2% owner of SCBC. When SCBC proffered its written direct case, which was consistent with its Integration and Diversification Statement, the ALJ struck, as a variance from the application as filed and amended, those portions which pertained to Ewing's proposed integration as general manager, and SCBC's divestiture pledge, which was predicated on Ewing's participation at the station (one of the prerequisites for receiving a "daytimer" preference. *Second Report and Order*, 101 FCC 2d at 646).

6. Relying on *Northland Communications*, 100 FCC 2d 914 (Rev. Bd. 1985), *review denied*, 60 RR 2d 776 (1986), SCBC claims there was no variance. It argues that it was error for the ALJ to compare its hearing exhibits to its application and that the proper inquiry should have been to compare the hearing exhibits to the Integration and Diversification Statement, by which time, SCBC submits, its integration proposal was definite and certain. SCBC further claims it was error for the ALJ to issue his ruling without first eliciting live testimony on the matter, citing *NEO Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC 2d 380 (1986).

7. The ALJ's actions were correct. It is longstanding Commission practice that applicants will not be allowed to amend their applications in a manner that will improve their comparative positions after the cut-off date for amendments as of the right, *i. e.*, the "B" cut-off date. *See generally Alexander S. Klein*, 86 FCC 2d 423, 434 (1981). But, because the former application form, which was used in this case, did not explicitly require applicants to set forth their full integration proposal in their applications, *see Muncie Broadcasting Corp.*, 89 FCC 2d 123, 131 (Rev. Bd. 1982), applicants generally waited until the exchange of exhibits before revealing their complete integration proposals for the first time. However, where contrary representations have been made in the application, and not revised by timely amendment, an applicant has been estopped from varying those representations at hearing. *See Leflore - Dixie, Inc.*, 100 FCC 2d 331, 334 (Rev. Bd. 1985); *see also NEO Broadcasting Co.*, 103 FCC 2d at 1033-1034; *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494 (Rev. Bd. 1979)("applicant . . . not permitted to improve its comparative position at hearing by proffering evidence which is at variance with its *application* ") (emphasis added) (subsequent history omitted).

8. Relying on *Northland*, SCBC argues that it need only set forth a definite and certain integration proposal by the date prescribed by the ALJ (even if inconsistent with its application). This reliance is misplaced. *Northland* arose in the context of a contingent integration proposal and merely reaffirmed an earlier-approved practice of permitting applicants to tender their integration proposals at a post-designation date set by the ALJ, *see Metro Broadcasting, Inc.*, 99 FCC 2d 688, 702-703 n. 9 (Rev. Bd. 1984) (subsequent history omitted). *Northland* made no reference to variances, and explicitly stated that its discussion should not be construed as a "departure from current Commission policy or the general prohibition against post "B" cut-off date upgrading, since the freeze on comparative positions as of that date in reality only pertains to that information that can readily be gleaned from an examination of the application." 100 FCC 2d at 917. *See also Inlet Broadcasting Co.*, FCC 90R-35, released May 23, 1990 (Concurring Statement) ("nothing [in *Northland*] held that a 'flat conflict in the integration proposal revealed by *other evidence*, and not qualified by a clear contingency, could *not* be noticed by the Commission'"). All information in the application is used by the Commission to determine whether the applicant is basically qualified and consistent with the public interest. Therefore, the accuracy of information in the application is crucial to the FCC's statutory obligations, and that information *must* be amended pursuant to 47 CFR §1.65 when it is no longer substantially accurate and complete in all significant respects, or, as in this case, where it has a comparative bearing. SCBC never sought to amend its application

to show that Thomas would no longer be the station's general manager. It cannot now ignore information in the application which is inconsistent with its direct written case in order to obtain a comparative advantage. Finally, SCBC's claim that *NEO* requires live testimony before finding a variance is erroneous. Here, the variance was patent on the face of the application (as amended) and the hearing exhibits. In *NEO*, because the application had been amended to show that its owner would work at the station (without specifying her position), the variance became apparent only after testimony had been proffered at the hearing varying from the information contained in the application.

9. Moreover, SCBC's claim (Br. at 6) that its integration proposal was definite and certain on the Integration and Diversification Statement date, is dubious at best, in light of the deposition testimony of Ewing, and, were there no variance, would raise a question whether Ewing's commitment is too tenuous to warrant credit. *See generally Bradley, Hand & Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982) (proposal credited where applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out). It became clear at oral argument that, as late as the deposition session of Ewing in this proceeding, SCBC was still uncertain who would be its general manager:

> [SCBC Counsel]: At Page 15 of the deposition on Line 6 when answering the question, [Ewing] said I don't know the answer to that -- the question about who's going to be the general manager. He said I don't know the answer to that. On Page 17, Lines 20 to 24, he said Lowell Thomas. On Page 23 on Lines 6 to 8, he said Ted Ewing. On Page 25, Lines 24 to 25, he said Ted Ewing with Lowell Thomas' assistance. On Page 61, Line 3, he said with reference to the AM station, I manage it. On Page 64, Lines 7 to 9, he said I am the President of the corporation and on Page 89, Line 20 to 25, he said this is semantics. I don't know if I'll be President or general manager. If we don't have a confused witness in eighty pages of a deposition, of a discovery deposition, *there are seven answers to the same question no two of which are identical.*

Oral Arg. Tr. 350-351 (emphasis added).

10. SCBC's final contention is that the ALJ erred in failing to permit it to adduce evidence that Ewing had compiled a superior past broadcast record at WENG (AM). *Memorandum Opinion and Order*, FCC 89M-676, released March 1, 1989. SCBC's exception is nondecisional in light of our ultimate disposition below, para. 18 and need not be considered. *See Communications Properties, Inc.*, FCC 83-320, released July 7, 1983 (applicant receiving substantial diversification preference would prevail even if opponent were awarded substantial preference for past broadcast record and integration).

CAWLEY

11. Cawley is a corporation with one stockholder, Augustine (Gus) M. Cawley. The *I. D.* found that Gus Cawley had acquired and sold interests in five radio stations over an eleven year period, prior to filing his application here. *I. D. Findings*, para. 15. He currently owns AM stations in Kissimmee, Florida and Vineland, New Jersey, both of which he timely pledged to divest. Although crediting both Cawley's divestiture pledge and his claim for 100% quantitative integration credit, the ALJ characterized Cawley as a "born trafficker," and gave virtually no weight to Cawley's years of broadcast experience. *Id., Findings*, para. 15; *Concls.*, para. 10. SCBC contends that the ALJ erred in awarding Cawley any quantitative integration credit, arguing that his propensity for dealing in broadcast licenses requires a finding that his integration proposal will not be adhered to on a permanent basis, as mandated by the *Policy Statement*, 1 FCC 2d at 395 n. 6. Cawley, for his part, contends that the label of "trafficker" is erroneous and prejudicial, insofar as it adversely affected the ALJ's evaluation of his qualitative integration proposal.

12. The term "trafficker" has been used to describe those individuals "who speculate[d], barter[ed], or trade[d] in [broadcast] licensees . . . to the detriment of the public interest." *Edina Corp.*, 4 FCC 2d 36, 60-61 (Rev. Bd. 1966). To discourage such activities, the Commission, for more than twenty years, closely scrutinized the transfer and assignment of licenses held for a period it deemed "*prima facie* inconsistent with the duties of the licensee and the public interest," *i.e.*, three years to track the then-license period. *Procedures on Transfer and Assignment Applications*, 32 FCC 689, 690 (1962). This policy, enacted as a so-called-three-year rule, 47 CFR §73.3597 (requiring a hearing for assignment and transfer applications where the license was held less than three years absent extenuating circumstances), was eliminated in 1982, the Commission having concluded that the public interest would be better served by allowing station sales transactions to be regulated by marketplace forces. *Transfer of Broadcast Facilities*, 52 RR 2d 1081, 1087 (1982). In the instant case, there has been no allegation that the sale of Cawley's interests in any of his various broadcast facilities has contravened any outstanding Commission rule or policy; and, thus, his "activities" are irrelevant in the integration analysis. SCBC's speculative arguments to the contrary are therefore rejected.

13. Thus,we affirm the ALJ's award of 100% quantitative integration credit to Cawley, specifically disavow the description of that applicant as a "trafficker," and conclude that Cawley's quantitative integration proposal is qualitatively enhanced by Cawley's 14 years of past broadcast managerial experience. Cawley Exh. 1. In this latter regard, we reject a claim by Sandpiper that it was erroneously denied an opportunity to examine Cawley concerning the breadth of his broadcast experience. Specifically, it sought to inquire into a failure by Station WENU, Hudson Falls, New York to file certain reports with the Commission while Cawley was at the station. However, the ALJ properly averted an inquiry into this matter absent a threshold showing by Sandpiper. Tr. 143. The Commission has stated that an applicant's previous broadcast experience "may be examined qualitatively" only "upon an offer of proof of particularly poor or good previous accomplishment." *Policy Statement*, 1 FCC 2d at 396; *Cf. Gilbert Group, Inc.*, 49 RR 2d 1081 (1981). No such showing was made here by Sandpiper.

SANDPIPER

14. Sandpiper is a Florida corporation comprised of four shareholders. John E. Piper and his wife, Patricia, each own 50% of the voting stock while Piper's father, William, and his brother, William Piper III, own all of the nonvoting stock. Each shareholder has a 25% equity interest in the corporate applicant. The applicant was formed in 1986 to obtain a new FM station at Holmes Beach, Florida (MM Docket No. 88-85), but that proceeding later settled with Sandpiper receiving a one-seventh interest in the permittee. *See Memorandum Opinion and Order*, FCC 89M-683, released March 2, 1989. By amendment, filed March 15, 1989, Sandpiper timely pledged to divest itself of that interest, and was not charged with an attributable media interest. The ALJ, as noted earlier, credited Sandpiper's integration proposal and awarded that applicant 100% quantitative integration credit.

15. SCBC, Cawley, and ERI each claim that the ALJ erred in awarding Sandpiper its full integration proposal. Specifically, SCBC submits that Sandpiper's withdrawal from its previous Holmes Beach integration commitment reflects that its current integration proposal is untrustworthy, uncreditable, and, citing *Houston Family TV, Ltd.*, 101 FCC 2d 661 (Rev. Bd. 1985), should have been denied. Cawley, in turn, urges that Sandpiper is entitled to no more than the equity interests held by the voting shareholders. It asserts that subsequent to the Holmes Beach settlement, Sandpiper, which was similarly structured there as here, reorganized itself into a limited partnership. Piper and his wife, who in the aggregate owned 50% of the applicant, received (subsequent to the change in ownership structure), only a 33% interest, as limited partners, with 66% attributable to Piper's father and brother (also limited partners). Sandpiper, the corporate applicant, remained as general partner with a 1% equity interest. Anticipating a similar change here, and alleging that the family generally operates with Piper's father in control, Cawley argues that Sandpiper's corporate structure is merely a convenient facade. ERI contends that the credit should be discounted because the nonvoting shareholders have contributed all funding for the venture. With respect to the enhancements, Cawley contends that the ALJ's qualitative analysis was flawed because "education and business experience," alluded to in the *I. D.*, is not an FCC-recognized enhancement factor, and Ms. Piper's cross- examination testimony concerning relocating to Englewood was far from definite. Finally, Cawley would also impose a diversification demerit against Sandpiper, contending that its divestiture pledge was incomplete since the hearing exhibit states that only Sandpiper (which Cawley equates as the corporate applicant in the Holmes Beach permittee holding a 1% equity interest) will divest itself of its ownership interest, leaving the 99% remainder of the equitable interest attributable to the applicant.

16. Initially, the Pipers' withdrawal from their Holmes Beach integration commitments following the settlement of that proceeding is not, on the facts of this case, a sufficient basis for denying Sandpiper its claimed integration credit. The test generally has been that integration representations made in comparative hearings are to be discharged in good faith with whatever revisions are necessary in light of changed circumstances. *Tidewater Telerado, Inc.*, 24 RR 653, 657 (1962); *see also Valley Broadcasting Co.*, 4 FCC Rcd 2611, 2614-2615 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 499 (1990). Here, there has been no showing whatsoever that the integration commitments in the Holmes Beach proceeding were advanced in bad faith. The settlement of that case resulted in Sandpiper receiving only a 14.29% equity interest in the permittee, and Sandpiper asserts it was no longer in a position to effectuate its earlier proposal. Sandpiper Br. at 12. To the extent that *Houston Family*, 100 FCC 2d 668-672, lends support for a contrary result, that case has been effectively overruled by the Commission's holdings in *Ruarch Associates*, 103 FCC 2d 1178 (1986) and *Mark L. Wodlinger*, FCC 89I- 04, released January 10, 1989, that applicants and principals are not bound by their integration and diversification pledges in cases terminated by settlement agreements. *See however WCVQ, Inc.*, 4 FCC Rcd 4079, 4080 n. 4 (Rev. Bd. 1989), where the Board voiced concern that the *Ruarch* policy could contribute to an abuse of the comparative process. However, we specifically limited our concern there to those situations other than where the terms of a specific settlement might necessitate a change in the licensee structure. [1]

17. Moreover, we are not persuaded that the restructuring of the Sandpiper applicant in the Holmes Beach proceeding to a limited partnership following settlement undermines the credibility of the present commitment here. Sandpiper submits (Reply at 15-16) that Piper and his wife held equity interests (*i. e.*, a total of 50%) in the Holmes Beach applicant in excess of their respective pro-rata capital contributions (*i. e.*, 33 1/3%) because they were the individuals who would be running the station, but when that predicate was no longer applicable because of the settlement, they determined that it would be appropriate for the allocation of interests to be consistent with the capital contributions to the corporation. Cawley's other claim, based on Tr. 221-223, that Piper family operations are generally controlled by Piper's father, is a *non sequitur*, since those pages of the transcript refer merely to commercial real estate ventures in which Piper's father is most knowledgable. Finally, ERI's factual predicate for diminishing Sandpiper's quantitative credit (*i. e.*, all funding by nonvoting shareholders) is erroneous. Tr. 195. Thus, there are no convincing grounds for diminishing Sandpiper's quantitative integration credit. With respect to its qualitative enhancements, we credit the Pipers commitments to relocate to Englewood. There is nothing inimical in Ms. Piper's response that she intends to live in Englewood "or on the water." Tr. 250. (Englewood is located on the Florida Gulf coast.) We agree, however, with Cawley that the "education or business experience" of the Pipers is not a decisional factor in the comparison between Sandpiper and Cawley. *See Policy Statement, supra.* Finally, we credit Sandpiper's divestiture pledge. On acquiring its interest in the Holmes Beach facility pursuant to the settlement agreement, Sandpiper timely amended the instant application under 47 CFR §1.65 to report the acquisition, and to pledge simultaneously that it and its shareholders would divest their interests in the permittee in the event of a grant of Sandpiper's application. At hearing, the applicant reaffirmed its intent to divest, alluding to its pledge in the amendment. That is sufficient.

SUMMATION

18. All exceptions having decisional significance have been considered by the Board. We have affirmed the ALJ's conclusion that a variance between SCBC's application and its direct case requires both a diversification demerit against that applicant and a rejection of its integration proposal. Moreover, ERI's 50% integration proposal, even if credited, is too little to prevail. Thus, this case is really only a close contest between Sandpiper and Cawley. They are even on diversification, and are both entitled to 100% quantitative integration credit. On the qualitative enhancements, both propose to move to Englewood. Additionally, Cawley is easily superior on past broadcast experience (14 years of management level experience by 100% owner versus 6 years of lesser experience by 50% shareholder Patricia Piper), and would prevail comparatively were that the only other qualitative factor here. *See James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988). However, past broadcast experience is generally deemed of "minor significance" *see Policy Statement*, 1 FCC 2d at 396; and, here, Sandpiper is entitled to gender enhancement credit for Patricia Piper's participation at the station. Thus, the comparative scale must tip in favor of Sandpiper because of female ownership. Claiming that the question of female preferences is currently before the United States Supreme Court in *Metro Broadcasting Inc. v. FCC*, No. 89-453, Cawley urges us to defer action in this case pending the Court's disposition. We will deny the Motion. Recent precedent requires that we apply this gender enhancement. *See William M. Piner*, 5 FCC Rcd 441 (1990).

19. ACCORDINGLY, IT IS ORDERED, That the petition for leave to file informational statement, filed December 5, 1989 by Sandpiper Broadcasting, Inc., IS GRANTED, and the informational statement IS ACCEPTED; that the joint motion to strike, filed December 21, as supplemented December 22, 1989 by Cawley Broadcasting, Inc., Englewood Radio, Inc., and Sandpiper Broadcasting, Inc. IS DENIED; and that the contingent motion for deferral of action, filed May 7, 1990 by Cawley Broadcasting Corporation, Inc., IS DENIED; and

20. IT IS FURTHER ORDERED, That the applications of Sarasota-Charlotte Broadcasting Corporation (File No. BPH-870908MX), Cawley Broadcasting Corporation, Inc. (File No. BPH-870910MM), and Englewood Radio, Inc. (File No. BPH-870910NS) ARE DENIED, and the application of Sandpiper Broadcasting Inc. (File No. BPH-870910OG) for a new FM broadcast facility at Englewood, Florida IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] However, the Commission is currently reconsidering the *Ruarch Policy*. *See News Release*, Mimeo No. 3137, dated May 10, 1990, describing *Notice of Proposed Rulemaking on Streamlining Comparative Process*, FCC 90-194, action May 10, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CITADEL COMMUNICATIONS
COMPANY, LTD.
(Assignor)

and File No. BALCT-890829KF

ACT III BROADCASTING OF
BUFFALO, INC.
(Assignee)

For Assignment of License of
Television Station WUTV(TV),
Buffalo, New York

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1990; Released: June 19, 1990

By the Commission:

1. The Commission has before it for consideration: (1) the above-captioned application for consent to the assignment of the license of station WUTV(TV), channel 29 (IND), Buffalo, New York, from Citadel Communications Company, Ltd. (Citadel) to Act III Broadcasting of Buffalo, Inc. (Act III); (2) an associated request for a temporary waiver of Section 73.3555(a)(3) of the Commission's Rules, the contour-overlap rule; (3) a petition to deny filed by WROC Associates, licensee of station WROC-TV, channel 8 (CBS), Rochester, New York;[1] (4) an informal objection filed by Stevens Media Systems, Inc. (Stevens), a corporation that is considering the acquisition of television stations in Rochester and Buffalo; and (5) related pleadings.

2. Act III is controlled in common with Act III Broadcasting of Rochester, Inc. (Act III-Rochester), licensee of WUHF-TV, channel 31 (IND), Rochester, New York. Act III and Act III-Rochester are both wholly owned subsidiaries of Act III Broadcasting, Inc. Because the predicted Grade B contours of WUTV(TV) and WUHF-TV overlap, the application is subject to Section 73.3555(a)(3) of the Commission's Rules, which generally prohibits common ownership of television stations that have overlapping Grade B contours. Act III has requested a 12-month waiver of Section 73.3555(a)(3) in order to divest its interest in WUHF-TV.[2]

WAIVER REQUEST

3. In support of its request, Act III states that a period of up to 12 months is needed to sell WUHF-TV in an orderly fashion. It would be inequitable, Act III argues, to require it to "choose between the immediate 'forced' sale of its existing station or foregoing the chance to 'move up' to a . . . [larger] market broadcast facility," citing *KRTH (AM)*, 5 FCC Rcd 2059 (1990). Additionally, Act III maintains, a temporary waiver is consistent with the public interest and precedent. Act III claims that a grant of its request would facilitate a stronger, healthier television market in Buffalo, and would have minimal impact on the fundamental policies served by the multiple ownership rules. It states that the stations serve separate and distinct markets and are not direct competitors, and that the overlap area is confined to a small, sparsely populated area at the fringes of the two markets. It notes that the overlap area would encompass 301 square miles and 41,753 persons which is 11.3% of the area and 3.1% of the population within WUTV(TV)'s Grade B contour, and 10.7% of the area and 4.3% of the population within WUHF-TV's Grade B area.[3] Act III states that WUTV(TV) is part of the Buffalo market, the 38th largest, while WUHF-TV is part of the Rochester market, the 72nd largest.

4. Act III further asserts that during the period of the waiver the stations will operate independently of one another and will have separate and autonomous programming, sales, and traffic departments. Moreover, it observes, the overlap area receives an abundance of broadcast, cable and other media services.[4] Act III states that the two principal communities in the overlap area, Batavia and Albion, are each served by 35-channel cable systems that collectively provide service to 19,734 subscribers (a 54% cable penetration). It points out that the remaining rural portion of Stafford County within the overlap area is served by a cable system having a channel capacity in excess of 35 channels, and a penetration rate in excess of 80%.

5. Act III states that an analysis of the Buffalo market indicates that it is a difficult competitive environment for UHF independent television stations because they must compete with numerous informational outlets (*i.e.*, network affiliates, cable systems, radio stations, and other program delivery systems) for scarce advertising revenues. It notes that the Buffalo market, having 609,500 television households, is served by seven television stations (see footnote 4 above),[5] and twenty-six cable systems having 338,341 subscribers. Act III claims that the two UHF independent stations licensed to Buffalo, WUTV(TV) and WNYB-TV, have inferior signals placing them at a disadvantage with their VHF network competitors in coverage. Moreover, it notes that since commencing operation in 1987, WNYB-TV has been operating at a yearly loss in excess of $1 million, and that these losses are expected to continue. Act III asserts that although WUTV(TV)'s operating history is better, its competitive posture has been substantially eroded by WNYB-TV's presence. It claims that WUTV(TV)'s ratings have declined 50% in the last two years, and that the station's local advertising revenues, which are "below budget," are in a downward spiral. Act III asserts that if it were not for improved sales in Canada, the station would be losing money.

6. These economic circumstances, Act III contends, have driven independent stations in the Buffalo market into a desperate battle for both programming and advertiser support. Act III states that the subject transaction is an integral part of several agreements it has entered with the licensees of WUTV(TV) and WNYB-TV. It believes that these agreements, which will effect a "consolidation" of these stations, will arrest the deteriorating competitive conditions faced by these stations. Under the

agreements, in addition to acquiring the license and assets of WUTV(TV), Act III will acquire the program library and certain studio and remote origination equipment of WNYB-TV and Niagara Frontier Broadcasting Partnership (Niagara), the current licensee of WNYB-TV, will purchase a noncontrolling equity interest in Act III. The remaining assets of WNYB-TV will be sold to Tri-State Christian TV, a nonprofit company.[6] Act III maintains that the "consolidation" of WUTV(TV) and WNYB-TV, when combined with the resources and experience of the Act III station group as enhanced by the participation of Niagara's principals, will create an environment that is conducive to community service. It believes that WUTV(TV) will emerge as a strong, competitive independent UHF television station.[7] Act III asserts that WNYB-TV, as a religious station, will be freed from its reliance on the same programming and advertising sources as a competing independent television station. Moreover, it notes that a grant of its request would ensure the continuation of local ownership of a Buffalo station. Presently, it avers, WNYB-TV is the only Buffalo station with local ownership. It points out that while WNYB-TV is being sold to a nonlocal entity, WNYB-TV's present owners will have an equity interest in Act III and will be active in the operation of WUTV(TV). Further, Act III states, it has already undertaken steps to locate a qualified minority buyer for WUHF-TV. Act III states that through these efforts it hopes to enhance the diversity of media ownership in Rochester.

PLEADINGS

7. *The Petition to Deny*. Petitioner alleges that a grant of the proposed waiver would be contrary to the public interest and the policy objectives of the multiple ownership rules. It claims that the proposed overlap is not *de minimis* and that Act III has not shown that the public will receive any benefits to outweigh the adverse impact of a waiver on diversity and competition. Petitioner maintains that under Act III's proposal, conventional, independent television operation in a Top-50 market would become the province of only one station. The transaction proposed here, Petitioner contends, would not make two independent stations more competitive, but would give WUTV(TV) the independent sector of the market, as WNYB-TV converts to a religious format.

8. Additionally, Petitioner asserts, although Act III contends that grant of the waiver would facilitate the local origination of programming on WUTV(TV), Act III has declined to make such a commitment or to identify the type of local programs it might produce should it decide that its finances would permit such origination. Moreover, Petitioner avers, Act III does not explain how introducing a group owner into the Buffalo market promotes the public interest any more than would the acquisition of the station by a non-group owner. It claims that Act III's ownership of WUTV(TV) would result in one less station that could be controlled by a local entity. It further states that while WNYB-TV may be placed in the hands of an experienced religious broadcaster, the new licensee of that station would be nonlocal as well. Thus, Petitioner argues, the net effect in Buffalo of the proposed transaction would be to reduce local ownership in the Buffalo television market by the trade of a locally controlled station for one in which local residents have a small ownership interest. The small ownership interest to be given to local residents, Petitioner contends, even when accompanied by their participation on the Board of Directors, provides no real opportunity to influence station policies in general or local programming in particular.

9. Petitioner further argues that Act III's reliance on the Commission's action in *KRTH (AM), supra*, to support its temporary waiver is misplaced because the compelling factors present in the Los Angeles case are absent here. There, Petitioner maintains that: (1) the potential for negative impact on diversity of voices was greatly attenuated in the Los Angeles case; (2) the Los Angeles waiver proponent already had enlisted a broker, had met with prospective buyers, and was actively seeking others; and (3) the two Los Angeles-area stations were to be staffed, operated, and programmed separately during the interim preceding divestiture. In contrast, Petitioner claims that, while Act III commits to having separate sales departments and separate local and national rate cards, it has not disclaimed any plans to offer joint rates or defined what role it would have in WUHF-TV's Rochester operation after divestiture.[8] A "non-attributable" interest in WUHF-TV's Rochester operation after divestiture, Petitioner asserts, combined with any involvement in the on-going operation of WUHF-TV would effectively extend to Act III almost the same degree of flexibility and control it initially sought through a permanent waiver. Noting that neither station is in bankruptcy, and that the Buffalo acquisition is not an integrated part of a larger, overall transaction, Petitioner states that there is no compelling public interest basis for a temporary waiver. In conclusion, Petitioner states that Act III has not shown that the benefits of its proposed waiver are in the public interest or that the fundamental policies served by the multiple ownership rules would not be compromised.

10. *The Informal Objection*. In its objection and the supplement thereto, Stevens argues that Act III's divestiture proposal is an insufficient remedy because the substantial competitive edge which a temporary waiver would confer on Act III, potentially places Stevens at a significant advertising disadvantage for a 12-month period. Additionally, Stevens claims that the waiver request should be denied because the overlap is not *de minimis*; the proposal is an attempt to monopolize Western New York's UHF market; the preservation of local ownership will not be enhanced by the proposal; and the Buffalo and Rochester markets are similar.

11. *The Reply*. Act III maintains that Petitioner's response to its temporary waiver request primarily reiterates Petitioner's prior objections to the permanent waiver. Therefore, it claims that the factual premise on which Petitioner's objections are based has been mooted by its commitment to divest WUHF-TV. Concerning Petitioner's claims that the *KRTH (AM)* case is inapposite here, Act III maintains that the potential for negative impact on diversity was greater in *KRTH (AM)* because the stations which were to be commonly owned were in the same market; the stations had service areas that overlapped in heavily populated regions; and the service areas overlapped to a substantial degree (*e.g.*, 59% of one station's nighttime contours fell within the overlap area). Moreover, it states that there is no basis for distinguishing between the preliminary efforts that have already been made to sell WUHF-TV and the steps toward a sale that had been taken by the waiver proponent in *KRTH (AM)* five months after a divestiture commitment had been made. Concerning Petitioner's assertions that it should

make certain representations concerning the pre-divestiture operation of WUTV(TV) and WUHF-TV to insure the independent operation of the stations during the waiver period, Act III states that it has pledged to refrain from joint and combination sales. Additionally, during the period of time prior to the divestiture of WUHF-TV, it represents it will undertake the following: (1) WUTV(TV) and WUHF-TV will employ separate national sales representatives firms in both the United States and Canada; and (2) WUTV(TV) and WUHF-TV will not engage in joint acquisition of syndicated, sports or other forms of entertainment programming for broadcast on the two stations.

12. Further, Act III asserts that it has been silent regarding any ownership interest or managerial role it may retain in WUHF-TV following divestiture because Act III-Rochester has pledged to divest its interest in WUHF-TV. It states that the details of that divestiture are unknown at this time, but will be fully disclosed to the Commission at the appropriate time, and all interested parties will have an opportunity to comment.

DISCUSSION

13. The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73. 3555 of the Commission's Rules*, 4 FCC Rcd 1723 (1989), *partial recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989); *Multiple Ownership Rules*, 97 FCC2d 997 (1984), *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Before such a waiver can be granted, even on a temporary basis, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.[9]

14. In challenging the WUTV(TV) assignment application, pursuant to Section 309(d) of the Communications Act of 1934, as amended, Petitioner must, as a threshold matter, submit specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Once the pleading standard is satisfied, the Commission must determine whether the record as a whole (*i.e.*, the application, the pleadings, and other matters which may be officially noted) presents a substantial and material question of fact requiring a hearing. *See* Section 309(d)(2). Against this backdrop, we turn to the question to be resolved here; namely, has a sufficient showing been made to warrant a temporary waiver of the multiple ownership rules so as to permit common ownership of WUTV(TV) and WUHF-TV with overlapping Grade B contours?

15. On the basis of the representations before us and the circumstances of this case, we conclude that a temporary waiver of our overlap prohibitions contained in our multiple ownership rules would be consistent with the public interest and our previous decisions, including *KRTH (AM), supra. See Earl R. Stanley, Esq.*, 3 FCC Rcd 604 (1988) (radio) and *Family Television Corp.*, 59 RR2d 1344 (1986) (television). The proposed overlap in this case, predicted or terrain limited, is not *de minimis*. However, because the common ownership is temporary and will exist only for a relatively short period of time, we do not find that the 12-month waiver period requested by Act III raises any substantial and material question of fact regarding possible significant detrimental effects on the public interest.[10] Further, we do not believe that forcing an immediate sale of WUHF-TV for diversity's sake alone would be in the public interest. Such a forced sale could unnecessarily restrict the value of the station and could artificially limit the range of potential buyers to those with immediate access to the necessary capital, which may preclude the purchase of the station by local groups or minority-controlled entities. In this regard, we note that Act III has indicated that it has taken steps to find a minority buyer. Thus, we find that requiring immediate divestiture of WUHF-TV could work an economic hardship on Act III without offsetting public interest benefits. *See Metromedia Radio & TV*, 102 FCC2d 1334 (1985), *recon. denied*, 59 RR2d 1211 (1986). Additionally, we find that the representations made by Act III concerning the operation of WUTV(TV) and WUHF-TV during the waiver period, insure the independent operation of the stations. We have considered the applicants' request for a temporary waiver. We have also carefully reviewed the opposition to that request and other allegations raised by the petitioner and the objector. We find that a 12-month waiver of Section 73.3555 will be consistent with the public interest. *Family Television Corp., supra.*

16. Turning to the allegations relating to the assignment itself rather than the waiver, Section 310(d) of the Act limits our consideration to the buyer proposed in an assignment application, and we cannot consider whether some other proposal might comparatively better serve the public interest. Accordingly, the question here is whether Act III's qualifications and proposed operation is consistent with the public interest, not whether a local owner might be comparatively preferred and not whether the buyer is a group owner or a single-station owner. Further, all licensees are accorded considerable discretion as to their programming. The brief programming narrative provided by Act III, stating that it is aware of its obligation and that it will provide issue-responsive programming, is all that is required. *Programming Information in Broadcast Applications*, 3 FCC Rcd 5467 (1988), *appeal pending sub nom. Office of Communications of the United Church of Christ v. FCC*, No. 88-1797 (D.C. Cir., filed Nov. 10, 1988) (consolidated Feb. 21, 1989 with No. 87-1243). Accordingly, no *prima facie* case has been made with respect to Act III's programming proposals. In addition, the Communications Act is not intended to insulate licensees from competition, *Sanders Bros. Radio Station v. FCC*, 309 U.S. 470, 475 (1940), and there is no apparent reason why we should be concerned about such matters with regard to prospective licensees such as Stevens. In any event, combination rates and other joint sales practices are the only anticompetitive practices that have been alleged in this case.[11] In that regard, Act III states that it will not engage in any joint sales practices between its Rochester and proposed Buffalo stations. Petitioner's concerns regarding any ownership interest or managerial role Act III may retain in WUHF-TV following divestiture is speculative at this time. Moreover, the application to assign WUHF-TV, when filed, will be reviewed for compliance with the Commission's Rules and policies, including

the multiple ownership rules, and with Act III's representations in this proceeding. Thus, there are no substantial and material questions of fact regarding these issues.

17. We further find that grant of the application is appropriate, despite the fact that WNYB-TV has been assigned to an entity that will operate it with a religious format. In that regard, the petitioner has not identified any Commission rule or policy prohibiting the operation of a station, previously operated with a conventional commercial format, from operating with a religious format. Nor has the petitioner demonstrated that Act III has acted in any manner inconsistent with our policies. While a review of the WNYB-TV assignment application discloses that the sale of that station to Tri-State Christian TV is contingent on Act III's acquisition of WUTV(TV), the application and related contract do not prohibit WNYB-TV from operating commercially in the future or from being later assigned to a for-profit entity. Thus, since a proposed licensee generally has the discretion to determine how its station will be operated, we find that the situation presented with respect to WNYB-TV does not present a *prima facie* case that grant of Act III's application would be inconsistent with the public interest.

18. In sum, having considered all the materials before us, we find that the petition to deny, the informal objection, and related pleadings filed in this proceeding either fail to allege a *prima facie* case or do not raise a substantial and material question that would require a hearing. Thus, we find that a 12-month period, from the date of consummation of the sale is appropriate to effectuate the orderly disposition of WUHF-TV. We further find that the applicants are fully qualified and that a grant of the application will serve the public interest.

19. Accordingly, IT IS ORDERED, That the petition to deny filed by WROC Associates and the informal objection filed by Stevens Media Systems, Inc. ARE DENIED.

20. IT IS FURTHER ORDERED, That the petition to deny filed by Buffalo Broadcasting Company, Inc. IS DISMISSED.

21. IT IS FURTHER ORDERED, That Citadel Communications Company, Ltd.'s application to assign the license of station WUTV(TV), Buffalo, New York, to Act III Broadcasting of Buffalo, Inc. IS GRANTED, subject to the condition that Act III Broadcasting of Buffalo, Inc. shall divest itself of all interest in, and connection with, station WUHF-TV, no later than 12-months from the date of consummation of the sale to Act III.

22. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail - Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A petition to deny was also filed by Buffalo Broadcasting Company, Inc. (BBC), licensee of station WIVB-TV, channel 4 (CBS), Buffalo, New York. Following an agreement among the parties, a request for withdrawal of the petition was filed. Nevertheless, consistent with the policy set out in *Booth American Co.*, 58 FCC2d 553, 554 (1976), we have fully considered the matters set forth in the petition and conclude that there are no substantial and material questions of fact that would warrant any further inquiry. Accordingly, BBC's petition will be dismissed.

[2] Act III originally requested a permanent waiver of Section 73.3555(a)(3), but on April 20, 1990, amended its application to request a temporary waiver of the rule.

[3] However, Act III claims that because of the rough terrain between the two stations, the actual Grade B contour overlap between the two stations is *de minimis*. This rough terrain, Act III alleges, has a shadowing effect on the two significant population centers (Batavia and Albion), shielding the two communities from the Grade B contour of WUHF-TV. Therefore, Act III asserts, the actual overlap area encompasses only 84 square miles (1.7% of the combined area, 3.2% of the WUTV(TV) Grade B area, and 3.2% of the WUHF-TV Grade B area), and 3,446 persons (0.2% of the combined population, 0.3% of the population within the WUTV(TV) Grade B contour, and 0.4% of the population within the WUHF-TV Grade B contour). An examination of the Buffalo-Rochester terrain indicates that the terrain is typical. That is, wide departures from average elevations do not generally exist. There may be some minor shadowing in the overlap area, as suggested by Act III. However, Act III overestimates the potential for shadowing.

[4] In addition to receiving predicted Grade B or better services from the seven Buffalo television stations (WGRZ-TV, channel 2 (NBC); WIVB-TV, channel 4 (CBS); WKBW-TV, channel 7 (ABC); WUTV(TV), channel 29 (IND); WNYB-TV, channel 49 (IND); WNED-TV, channel 17 (PBS); and WNEQ-TV, channel 23 (PBS)), Act III notes that the overlap area also receives services from the four other television stations licensed to Rochester (*i.e.*, WROC-TV, channel 8 (CBS); WHEC-TV, channel 10 (NBC); WOKR-TV, channel 13 (ABC); and WXXI-TV, channel 21 (PBS)).

[5] A construction permit is outstanding for channel 51, Batavia, New York, which would provide an eighth television service to substantial portions of the Buffalo market.

[6] The application (BALCT-890829KE) assigning the license and assets of WNYB-TV to Tri-State Christian TV was granted on October 19, 1989, but will not be consummated unless the Commission acts favorably on Act III's purchase of WUTV(TV).

[7] It should be noted that WUTV(TV), WUHF-TV, and WNYB-TV are independent stations. However, WNYB-TV broadcasts programs supplied by the Fox Television Broadcast Group which, upon "consolidation," will be broadcast on WUTV(TV).

[8] Petitioner avers that Act III should commit to the following representations in addition to those previously stated: (1) WUTV(TV) and WUHF-TV will employ separate national sales representative firms in both the United States and Canada; (2) the stations will not offer or sell time to advertisers jointly or in any combined form; and (3) the stations will not engage in joint acquisition of syndicated, sports or other forms of entertainment programming for broadcast on the two stations.

[9] Our recent changes in the one-to-a-market waiver standard did not alter our temporary waiver procedure. *See Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760 (1989).

[10] We note that the temporary waiver in this case is being granted solely on the basis of the facts and circumstances presented herein. In situations where more substantial overlap exists between two commonly owned stations or where there are fewer competing services in the overlap area, a different result may be appropriate.

[11] We have ruled generally that combination rates and other joint sales practices should not be subject to our initial review. *Unnecessary Broadcast Regulation (Business Practices)*, 59 RR2d 1500 (1986), *reconsideration denied*, 2 FCC Rcd 3474 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania	File Nos. BRCT-890331KG, KP, KI and KM, BRCT-8909403KR and KX

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1990; Released: June 29, 1990

By the Commission:

1. The Commission has before it for consideration: (1) the license renewal applications of six commercial television stations serving Philadelphia, Pennsylvania;[1] (2) a Petition to Deny filed jointly by the Office of Communication of the United Church of Christ ("OC/UCC"), the Philadelphia Lesbian and Gay Task Force ("Task Force"), the National Organization of Women, Pennsylvania Chapter ("NOW"), and Congreso De Latinos Unidos, Inc. ("Congreso") (hereinafter collectively referred to as "petitioners") against the aforementioned renewal applications; (3) opposition pleadings from the licensees; (4) the petitioners' reply; and (5) various other pleadings.[2]

PROGRAMMING

2. Petitioners argue that the licensees failed to provide a sufficient amount of general issue-responsive programming, as well as issue-responsive programming directed to the concerns of each minority group, as allegedly required by our rules and policies. [3] Petitioners state that there are specific issues that the licensees must address in order to provide adequate issue-responsive programming to the Philadelphia community, as a whole, and to provide specific programming addressing the concerns of women, African-Americans, lesbians and gays, and Hispanics. Based upon their review of each station's Issues/Programs lists,[4] petitioners compiled a study (hereinafter "Study")[5] which reports their assessment of the amount of programming each station devoted during its license term to the issues petitioners deemed significant to the above-listed groups. Petitioners then offer the Study as evidence that the amount of programming the licensees directed to these specific issues was *de minimis* in comparison to the population of each group specified.[6] Therefore, petitioners argue, the licensees could not have qualitatively addressed the significant issues of concern to their community of license individually or as an integrated television marketplace.[7] Similarly, petitioners question the quality of the licensees' programming by stating that the licensees addressed too many issues in too little programming time. Further, petitioners note that the Issues/Programs lists constitute an admission by each broadcaster that these lists alone reflect its most significant programming efforts.

3. The licensees argue that the issue in the instant case is whether they reasonably exercised their good faith discretion in selecting the issues they addressed. They also argue that, in exercising their discretion, they are not required to address every issue of concern to a particular group in the community. Rather, the licensees note that, since the Commission has eliminated quantitative programming guidelines, any inquiry into the licensees' programming should be qualitative with emphasis on the licensees' programming decisions, within their broad discretion, not the petitioners' opinions of which issues should be addressed.

4. Several licensees challenge the petitioners' Study, noting that the Study unjustifiably excluded a significant amount of the licensees' issue-responsive programming. They also state that the Study's analysis, in and of itself, is insufficient to raise a *prima facie* case regarding the licensees' programming. Other licensees challenge the integrity of the Study. They argue that petitioners failed to provide information concerning the specific programs included in the Study or the credentials of the primary researchers; failed to use adequate methods in analyzing their findings, including appropriate population statistics; and failed to characterize the Study's results adequately. They also note that the Study was not objective because the primary researcher was assisted by petitioners.

5. In addition, while not conceding the validity of petitioners' quantitative analyses, each licensee states that its station in fact ascertained the needs of the community, despite the elimination of formal ascertainment requirements, and that a substantial amount of its programming was indeed responsive to issues of concern to all groups designated by petitioners.

6. Petitioners defend their Study by noting that no licensee asserts different percentages reflective of their respective programming. They also contend that the methodology they used in conducting the Study was the best available, given the Commission's elimination of the requirement of more specific program logs.

7. Based on the foregoing arguments, petitioners request that we either designate each of the captioned applications for an evidentiary hearing or deny each of the applications. In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Act, as reiterated in *Astroline Communications Co. v. F. C. C.*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petitioner has demonstrated by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If so, then the second test is whether the entire record before us still shows that there is a substantial and material question of fact to warrant further inquiry. We note further that if the facts are not disputed, but disposition turns on inferences to be drawn from facts already known and the legal conclusions to be drawn from the facts, hearing is unnecessary. *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

8. With respect to the licensee's general issue-responsive programming obligations, we have eliminated previous guidelines regarding the provision of specified quantities of certain types of non-entertainment programming. *See Commercial TV Stations*, 98 FCC 2d 1076, 1090-92 (1984). Instead, we have granted licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the best way to address those issues. The Commission will not interfere with the broad-

caster's judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues or that the licensee has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community. *Commercial TV Stations*, 98 FCC 2d at 1092-94. *Deregulation of Radio*, 84 FCC 2d at 990-991; *Office of Communication of the United Church of Christ v. F. C. C.*, 707 F.2d 1414, 1431 (D.C. Cir. 1983) (*UCC III); Stone*, 466 F.2d at 328.[8] Petitioners have a heavy burden to show that the licensees' have abused their discretion. *Commercial TV Stations*, 98 FCC 2d at 1093-94.

9. With respect to issue-responsive programming addressing the concerns of specific minorities, we have determined that the licensee is not required to address every issue of concern to a particular group or every aspect of an issue that is addressed. *Evening News Ass'n*, 35 FCC 2d 366, 392 (1972); *Columbia Broadcasting System, Inc.*, 46 FCC 2d 903, 910-11 (1974); and *Commercial TV Stations*, 98 FCC 2d at 1087-88. Nor is the licensee required to present programming concerning a particular segment of the community in proportion to their percentage in the overall community's population. *Commercial TV Stations*, 98 FCC 2d at 1094; *TV Deregulation Reconsideration*, 104 FCC 2d 358, 367 (1986). Rather, the licensee is required to contribute to the overall discussion of community issues and therefore may meet its obligation even if it has not responded to problems of every community group. *Commercial TV Stations*, 98 FCC 2d at 1094.

10. *No Prima Facie Case*. The Study submitted by petitioners is insufficient to establish a *prima facie* case that the licensees' issue-responsive programming, generally, or as specifically devoted to each minority group, was *de minimis*. Initially, we note that the Study failed to credit the licensees for a substantial quantity of such programming as reported in the licensees' Issues/Programs lists. Issue-responsive programming may include, but is not limited to, programming described as public affairs, public service announcements ("PSA's"), editorials, free speech messages, community bulletin boards and religious programs. *Commercial TV Stations*, 98 FCC 2d at 1087. It may also include, although not primarily, news programming. *Alianza Federal de Mercedes v. F. C. C.*, 539 F.2d 732, 735 n. 25 (D.C. Cir. 1976)(*Alianza)*. An in-depth feature included in a news program could qualify as issue-responsive programming. *Radio Deregulation Reconsideration*, 87 FCC 2d at 807 n. 10. Further, issue-responsive programming of general concern may be considered to address the needs of subgroups within a community. *License Renewal Order*, 70 FCC 2d 1990, 1993 (1979); *Office of Communication of the United Church of Christ v. F. C. C.*, 359 F.2d 994 (D.C. Cir. 1966). Programs not produced locally may also meet the licensee's programming obligation. *Commercial TV Stations*, 98 FCC 2d at 1085 n. 28.

11. Despite the Commission's policy of defining a broad range of programming as issue-responsive, the petitioners excluded from the Study's analyses, as noted therein under the heading of "Methodology", all of the following:

1) programs involving religious, political or white ethnic minorities;

2) programs concerning discrimination against more than one minority or no clearly identifiable minority;

3) programs that did not specifically reference an issue that petitioners classified as a minority issue, even if the Issues/Programs list description indicated it was a "minority affairs" issue;

4) programs describing interviews with known minority community leaders if the issues they discussed were not specifically described; and

5) programs addressing issues of "general concern" to the community unless they were specifically described.

The Study also excluded network and syndicated programming (except that of KYW) because of a lack of description, as well as PSA's and much of the licensees' news programming.[9] Thus, without more, it is clear that the Study cannot support petitioners' allegation that any of the licensees' general issue-responsive programming or issue-responsive programming devoted to minority concerns was *de minimis*.[10] We also agree with KYW that the Study is flawed because it does not indicate which specific programs were included or excluded, an indication that it could have provided easily.[11]

12. The petitioners also argue that the quality of the licensees' programming was deficient because the licensees addressed too many issues in too little time. Further, with respect to quality of programming, petitioners allege that most of the licensees' issue-responsive and minority-oriented programming was aired at times of low viewership and was in a format that precluded in-depth treatment, *e.g.*, one-minute segments or talk shows. Petitioners have submitted insufficient evidence to support these qualitative allegations. Therefore, in view of the foregoing, we find that petitioners have failed to make a *prima facie* case regarding the licensees' issue-responsive programming.[12]

13. *No Substantial and Material Questions*. It further appears from the licensees' records, reviewed separately below, that the stations have provided programming to the extent and in a manner well within their broad discretion, and therefore, even if a *prima facie* case had been raised, we find that there are no substantial and material questions of fact requiring a hearing to resolve.[13]

14. *WGBS*. Review of information submitted in WGBS' opposition reveals that its issue-responsive programming has been more than adequate. Its program entitled "Profiles," comprised of 15-minute segments addressing issues of concern to each group cited by petitioners, has been broadcast Monday through Friday since July of 1987, We find this programming, which included such subjects as minorities and higher education, African-American history, women in the military, women's social services, Hispanic economic/social services issues, AIDS victims quilt and other gay and lesbian issues, to be extensive. Further, WGBS asserts that in May of 1987, the station broadcast several programs featuring African-American historians and representatives of the community as a result of interest generated in its broadcast of the docudrama series "Shaka Zulu." In addition, the record reflects substantial issue-responsive programming concerning senior citizens, consumer protection, community service and education. WGBS also reports that it has aired thousands of PSA's.

15. *WTXF*. Petitioners credit WTXF, among the stations studied, with providing the highest 1988 percentage of total issue-responsive time, 27.2%, devoted to all minority

issues. However, the Study asserts that WTXF has not served the needs of the minority community. To the contrary, we find that WTXF has presented a sufficient record of issue-responsive programming during its license term. Most of WTXF's issue-responsive programming appears to have been provided via the *Ten O' Clock News*, a daily 30-minute local newscast; *Newsprobe*, a weekly 30-minute public affairs program; special programming; PSA campaigns; and various syndicated programs (admittedly not included in petitioners' Study). The data indicates that WTXF's programs regularly addressed issue-responsive and minority-oriented programming, including such issues as the minority "set-aside" law in Philadelphia, Alzheimer's disease, the candidacy of Jesse Jackson, the anti-Klan demonstration, sexual harassment on the job, and the United Negro College Fund Telethon, as well as interviews with prominent Task Force leaders discussing the topic of gay bashing.

16. *WCAU*. WCAU's programming included many of the issues petitioners note as being critical and which petitioners charged WCAU with ignoring. For example, petitioners state that critical issues of concern to women include comparable worth, barriers to equality, legislative underrepresentation and women's poverty. WCAU's Issues/Programs lists indicate it covered these issues on a regular basis. Numerous interviews and programs were aired concerning child support for single mothers, homeless women, women's equality in sports, domestic violence, women's contemporary roles, and specifically, comparable worth. On a broader scale, WCAU regularly covered such issues as racism, black male role models, African-American artists, aging and retirement, violence against gays and funding for AIDS research. These issues were addressed via such programs as *Channel 10: The People*, a weekly public affairs program; *Channel 10 News Forum*, a 30-minute weekly news interview program; *Horizons with Edie Huggins*, an hour-long weekly interview series on public issues; and *Bravo*, a 30-minute weekly Hispanic public affairs program, to name a few. WCAU also notes that it does not include ordinary news coverage or PSA's in its Issues/Programs lists, yet these provide substantial issue-responsive programming.

17. *WPHL*. WPHL asserts that it provides issue-responsive programming on a regular, substantial basis and we find that the record supports this claim. For example, WPHL broadcasts two 30-minute public affairs programs weekly addressing significant community issues. In addition, at least 30 minutes of public affairs programming is broadcast each day of the week. Further, WPHL broadcast at least one 30-minute program monthly that was devoted solely to issues of concern to the African-American community. The station's *New Jersey Forum* and *Delaware Valley Forum* have addressed many minority issues during prime-time hours. These programs included issues concerning the improvement of living standards for the Hispanic community, sensitizing the public to the issue of AIDS, domestic violence against women, minority set-asides in the Richmond, Virginia Supreme Court case, and the role of black clergy in the community. Finally, WPHL states that, during 1988 and the first half of 1989, it broadcast 476 PSA's concerning women's issues, 163 PSA's concerning African-American issues, 106 PSA's concerning other specific minority groups, 43 PSA's concerning the lesbian and gay community, and 114 PSA's addressing the AIDS crisis. We find that the foregoing demonstates that WPHL has complied with its issue-responsive programming obligations.

18. *WPVI*. In reviewing the record of WPVI, we find that WPVI has addressed virtually all of the issues petitioners claim it ignored. For example, the Study credited WPVI for discussing "women in the marketplace" and "wages for housework". WPVI argues that these issues are merely aspects of the same overall issue of "comparable worth" and "barriers to equality", for which the Study did not give WPVI credit. We agree. Specifically, the program *Perspective* addressed issues affecting minorities including for example, the issue of minority poverty. *Visions*, another public affairs program, addressed, among other things, the high infant mortality rates among minorities, gay bashing and inequities in the justice system. The program *People to People* discussed legal and social rights for gays. Most telling of the Study's failure to credit licensees for certain obviously minority programming is the exclusion of a program broadcast by WPVI entitled *Puerto Rican Panorama*. This program covered a myriad of issues of concern to the Hispanic community, including bilingual education, Hispanic poverty and the Hispanic family. WPVI also aired many PSA's, including several for the Lesbian and Gay Task Force, one of the petitioners.

19. *KYW*. KYW's record indicates that it has devoted significant amounts of programming responsive to issues of concern to its community and specifically to those cited by petitioners. For example, KYW broadcast several hour-long segments on *People are Talking*, discussing issues such as violence against the gay and lesbian community; housewife/careerwoman choices, and racial tension in Philadelphia. A 30-minute weekly program called *City Lights* addressed concerns of the black business community and significant events affecting African-Americans. KYW covered specific issues noted by the petition as being critical, including the lack of child care for African-Americans, infant mortality among African-Americans, and government nonresponsiveness to Hispanic needs. An entire segment on *Evening Magazine*, a 30-minute public affairs program aired between 7:30-8:00 m., was devoted to the issues of comparable worth and barriers to equality for women.

PUBLIC FILE

20. Petitioners argue that WTXF, WGBS, KYW, and WCAU failed to comply with the reporting requirements set forth in Section 73.3526(a)(8) of the Commission's Rules.[14] We find, as reviewed below, that petitioners claims either lack merit or do not warrant sanctions.

21. *WGBS*. Petitioners argue that Station WGBS failed to maintain any lists in its public file for the period prior to July 1, 1987 in violation of the foregoing rule. Petitioners also argue that WGBS failed to describe with specificity those programs and issues that it included in its lists because it used the term "public affairs" as a description of program type. Further, petitioners claim that when WGBS supplemented its Issues/Programs lists already on file, it failed to include time and date information in those supplemental lists.

22. WGBS admits that its files were deficient. It states that through inadvertence the files prior to July 1, 1987 were misplaced due to a reorganization. Further, it states that its supplemental lists identified the most significant

programming treatment of issues it had identified in its original list, described additional programs, and separately listed the dates and times of the programs.[15]

23. We agree with petitioners, and WGBS readily concedes, that WGBS has not technically complied with the Rule's public file requirements. However, we do not view these errors, which WGBS attempted to rectify, to be of such magnitude as to warrant an evidentiary hearing. From the data provided by WGBS, we were able to discern that it had provided significant issue-responsive programming during its license term. This is the purpose of the reporting requirement. Thus, we find that there are no substantial and material questions as to whether the grant of WGBS' renewal application would be in the public interest. *Cf Amherst Broadcasting, Inc.*, 46 Rad. Reg. 2d (P&F) 497, 499 (1979). Nevertheless, we strongly admonish WGBS to exercise greater care in the future to comply with our public inspection file requirements.

24. *KYW*. Petitioners assert that KYW was inconsistent in reporting "type" of programming; did not provide a listing of significant community issues nor an index of all regularly scheduled issue-responsive programming; and failed to report the duration of PSA's. As noted above, a licensee is not required by our rules to note program "type," separately list significant community issues, nor provide an index of regularly scheduled issue-responsive programming. KYW specifically described its programming in such a way that we were able to easily extract the pertinent issues. While we recognize PSA's as issue-responsive programming, we do not believe that any significance attaches to the fact that the duration of each PSA broadcast is not provided, due to the typically short length of such announcements.

25. *WCAU*. Petitioners contend that WCAU did not provide complete and sufficient information concerning the time or duration of its programs; was inconsistent in reporting "type" of programming; provided no information on the number of times any program was rebroadcast; provided insufficient program descriptions; and failed to report duration of PSA's. Section 73.3526(a)(8) of our rules, however, does not require the licensee to report program "type" or the number of times any program is rebroadcast. Nor do we believe, as indicated above, that the omission of the duration of PSA's is of any real significance. Thus, we find that WCAU's descriptions of programs are sufficient to isolate the issues it addressed during its license term. Because we have only specified the type of information Issues/Programs lists should include, rather than how it should be organized, we believe that WCAU's use of indices on the cover of each quarterly lists is an efficient and unconfusing method of indicating the duration of programs without having to separately list their programs' durations throughout. Further, WCAU noted that it inadvertently failed to include the duration of some program segments within its news broadcasts. This error, which it has corrected, does not warrant an evidentiary hearing on denial of its license renewal application.

26. *WTXF*. We also find petitioners' arguments that Station WTXF deliberately attempted to forestall public review of its records fail to raise a *prima facie* case. Petitioners claim that WTXF altered its method of program documentation by placing each program or issue on a single piece of paper for the purpose of forcing petitioners to incur increased copying costs, which WTXF refused to waive. First, the evidence submitted by petitioners fails to provide adequate support for the proposition that WTXF "actively resisted" petitioners' efforts to obtain copies of information in the public file. Including each program or issue on a separate piece of paper does not raise public interest questions. Further, there is nothing in the record to indicate that WTXF charged more than a reasonable copying fee as allowed under Section 73.3526(f) of the Rules. The rule does not require the station to waive reasonable copying costs. Finally, as set forth in our rules, the public file must be available for inspection during the station's normal business hours. Members of the public cannot be required to inspect that file only through prior appointments or at times most convenient to the licensee and its station personnel. *Records Inspection - Public*, 28 FCC 2d 71 (1971). WTXF does have a policy of suggesting that advanced appointments be made to review the files where feasible. However, the station's public affairs director, in her unrefuted affidavit, avers that "there is no station requirement that an appointment must precede a file inspection, and the station has not turned away any unannounced members of the public who expressed a desire to review the file." Therefore, it does not appear that the practice of "suggesting" appointments has denied any member of the public access to the file at the time of the request. Accordingly, no further action is required on this point.

27. Accordingly, based on the foregoing, we find that the petitioners have failed to establish a *prima facie* case or to raise a substantial and material question of fact requiring resolution in a hearing. We further find that applicants herein are fully qualified and grant of their renewal applications serves the public interest, convenience and necessity.

28. IT IS ORDERED that the joint petition filed by the Office of Communications of the United Church of Christ, the Philadelphia Gay and Lesbian Task Force, National Organization of Women and the Congreso De Latinos Unidos, Inc. IS DENIED.

29. IT IS FURTHER ORDERED, That the license renewal applications for Stations KYW, WPVI, WCAU, WPHL, WTXF and WGBS ARE GRANTED.

30. IT IS FURTHER ORDERED, That the Mass Media Bureau shall mail copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The licensees of the applications before us are as follows: Group W Television, Inc., Station KYW-TV, Channel 3 ("KYW"); Capital Cities/ABC, Inc., Station WPVI-TV, Channel 6 ("WPVI"); CBS, Inc., Station WCAU-TV, Channel 10 ("WCAU"); WPHL-TV, Inc., Station WPHL-TV, Channel 17 ("WPHL"); TVX of Philadelphia, Inc., Station WTXF-TV, Channel 29 ("WTXF"); and Combined Broadcasting of Philadelphia, Inc., Station WGBS-TV, Channel 57 ("WGBS").

[2] Some of the licensees challenge the standing of the petitioners. An affidavit from a person stating that he or she views the station or resides in the station's service area is sufficient to establish standing to challenge viewer-related issues. Similarly, an organization may establish standing if it provides such an affidavit from one or more members who are local residents or viewers, and those persons indicate that the group represents them. *NAB Petition for Rule Making*, 82 F.C.C. 2d 89, 98-99 (1980). One of the petitioners has met this test by providing an appropriate affidavit. The joint petition will, therefore, be considered on its merits.

[3] For convenience, we will adopt the petitioners' reference to each of these groups as a "minority" even though not all the groups are typically recognized as "minority" groups.

[4] We require licensees to maintain in their public files, on a quarterly basis, lists of programs aired by the broadcaster that represent the most significant treatment of the issues the broadcaster believed to be of community concern. 47 C.F.R. Section 3526(a)(8)(1989).

[5] The Study was commissioned by and conducted with the assistance of petitioners and is entitled "Whose Public Interest?: A Study of Attention to Women, Minorities and AIDS in Issue Responsive Television Programming, 1986-1988." Petitioners also attached to their petition a study by Jim Donahue entitled, "SHORTCHANGING THE VIEWERS, Broadcasters' Neglect of Public Interest Programming," *Essential Information*, 1989 ("Donahue Study"). The Donahue Study assessed the extent of the issue-responsive programming of fifty television markets, including Philadelphia, using each market's local edition of *TV Guide* magazine. We find that the Donahue Study is not probative here because, among other things, it focuses on the fifty markets selected as a whole, rather than isolating each market's issue-responsive programming.

[6] Petitioners state that the quantity of programming is relevant when a broadcaster has aired little or no issue-responsive or minority-oriented programming during its license term, *i.e.*, its issue-responsive programming was *de minimis*.

[7] The "integrated marketplace" is a term used by petitioners to refer to the group of stations which together serve the entire Philadelphia market.

[8] The Commission will not dictate the issues and sub-issues that the licensees must address. *Commercial TV Stations*, 98 FCC 2d at 1092 and 1094; *Stone*, 466 F.2d at 328; and *Office of Communication of the United Church of Christ v. F. C. C.*, 779 F.2d 702, 708-09 and 711-12 (1985)(*UCC IV*).

[9] For example, our examination of WTXF's and WPHL's Issues/Programs lists clearly demonstrates that the Study was wrong when it reported that these stations did not address any issues of concern to African-Americans. *See infra*, paras. 15 and 17.

[10] In keeping with decisions eliminating quantitative guidelines, we do not intend to delineate the amount of issue-responsive programming that would be *de minimis* in any given case. However, we find the amount of programming noted in the Study with regard to each licensee to be adequate, contrary to petitioners' conclusions.

[11] The licensees further attack the analytical and objective integrity of the Study. For example, WPVI and WPHL note that the Study's use of weekly averages ignores the quality of programs and WCAU argues that petitioners should not have combined weekly averages of all stations in determining market failure because the stations use different methods for determining their most significant issues. However, we need not address these contentions in view of our findings with respect to the Study.

[12] The Study also suggests that the alleged programming deficiencies may be the result of a lack of women, minorities, and gays and lesbians on the stations' workforces. We find it unnecessary to address any such nexus in light of our determination that the licensees have met their public interest obligations. Further, this issue was not specifically alleged in the petition and petitioners have not argued that the stations violated the Commission's Equal Employment Opportunity rule.

[13] Petitioners argue that the licensees should not be able to buttress their programming showing by demonstrating programming not described in the Issues/Programs lists. We disagree. While licensees are required to describe those issues to which they have given the most significant treatment, they are not required to describe all of their issue-responsive programming in their Issues/Programs lists. It follows that the "significant treatment" requirement should not preclude licensees from demonstrating additional programming information, not listed in the Issues/Programs lists, in order to respond to petitioners' quantitative argument. *Cf. Deregulation of Radio*, 84 FCC 2d at 999.

[14] Section 73.3526(a)(8) of the Commission's Rules provides as follows:

> For commercial TV broadcast stations, every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period. . . . The list [should] include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. The description of the programs should include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

[15] Beyond these arguments, there is controversy about what was done and said by petitioners and WGBS. We have reviewed these additional pleadings in accordance with our public interest mandate and find no indication of an intent to deceive. Therefore, we find petitioners have failed to raise a *prima facie* case concerning WGBS' candor.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Capital Network System, Inc.
Complainant,

v. File No. IC-90-01018

Southwestern Bell Telephone Co.,
and American Telephone and
Telegraph Co.,
Defendants.

ORDER

Adopted: June 22, 1990; Released: June 29, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 29, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208. The complainant alleges that the exchange access services it purchased from the defendant Southwestern Bell at tariffed rates were provided discriminatorily, in that, "like" services were provided to AT&T by Southwestern Bell at less than the tariffed rates under a Shared Network Facilities Agreement (SNFA). The defendants have timely answered and generally deny any violation of the Communications Act or the Commission's Rules.

2. The defendants' reports that were filed in response to the informal complaint here do not appear to have satisfied the complainant. Section 1.718 of the Commission's Rules, 47 C.F.R. § 1.718, provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the report, makes specific reference to the informal complaint date, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint will soon be over.

3. The Commission's related tariff investigation in CC Docket No. 85-166 involves the same basic issues that underlie this complaint. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). The Common Carrier Bureau, in *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), held in abeyance a set of complaints that, like this, also involves SNFAs. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that the Rules may be waived for good cause. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. ACCORDINGLY, IT IS ORDERED that Section 1.718 is waived and that the above-captioned informal complaint proceeding be held in abeyance until such future date as will be determined by the Bureau. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, we further direct that all records that may be relevant to the complaint be retained until the Commission has issued a final ruling in the above-captioned case.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-90-069

Application for authority to acquire and operate capacity in the PTAT-1 cable system for the provision of authorized common carrier service between the U.S. and the United Kingdom

ORDER AND AUTHORIZATION

Adopted: June 20, 1990; Released: June 29, 1990

By the Chief, International Facilities Division:

I. INTRODUCTION

1. The above-captioned application filed on March 12, 1990 by TRT/FTC Communications, Inc. (TRT/FTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom and beyond. The application was placed on public notice on March 14, 1990. A Petition to Deny was filed on April 13, 1990 by Pan American Satellite (PAS). TRT/FTC replied to the Petition to Deny by letter of April 27, 1990.

II. SUMMARY OF PLEADINGS

A. TRT FTC Application

2. TRT/FTC is a non-dominant communications carrier authorized to provide common carrier services between the U.S. and the United Kingdom.[1] TRT/FTC previously has been authorized to acquire and operate circuits for service to the United Kingdom.[2] TRT/FTC is now requesting authority to acquire and operate one E-1 circuit (2.048 megabits per second) for service to the United Kingdom. TRT/FTC indicates that it will use the requested capacity in PTAT-1 to supplement existing facilities to accommodate continued growth in its U.S.-United Kingdom services and to satisfy private line customers specifying PTAT-1 routing.

B. The PAS Petition to Deny

3. PAS states that it has successfully secured INTELSAT Article XIV(d) consultations for all of its services with many countries. However, France has been a prominent exception. According to PAS, despite clear customer interest in both data and video transmission to and from France, France Telecom has consistently refused to consider any INTELSAT Article XIV(d) consultations for services beyond one-way video (U.S. to France). Thus, PAS argues, the French telecommunications market remains effectively closed to U.S. separate satellite systems.

4. PAS observes that France Telecom holds a 14.9 percent interest in TRT/FTC through various subsidiaries and holding companies. It notes that TRT/FTC is not, at present, considered a dominant carrier to the United Kingdom. However, PAS also notes that TRT/FTC indicates that it will accept dominant carrier status for services to France as a result of its merger with FTCC. PAS further notes that the Common Carrier Bureau Order granting FTCC non-dominant status [3] is the subject of a petition for reconsideration. PAS asserts that TRT/FTC should not be authorized to expand its operations in the U.S. during the pendency of the reconsideration proceeding. It states that the Commission has authority to evaluate market access issues in acting on Section 214 applications such as the instant FTCC applications. Citing *International Competitive Carrier*,[4] PAS asserts that the Commission has determined that it would consider, on a case-by-case basis, attaching conditions relating to reciprocal entry by additional U.S. carriers on Section 214 certificates granted to foreign-owned carriers. It further asserts that, until France demonstrates with concrete actions that its telecommunications markets are open to U.S. separate satellite systems, France Telecom's affiliate, TRT/FTC, should not be permitted to expand its U.S. operations. Therefore, PAS requests that the subject TRT/FTC application be denied or, at a minimum, held pending final resolution of the reconsideration proceeding pertaining to FTCC's dominant carrier status.

C. The TRT/FTC Opposition

5. TRT/FTC states in its letter that PAS has filed the same Petition to Deny every TRT/FTC and FTCC application. TRT/FTC states that PAS' arguments are repetitive and TRT/FTC will not burden the Commission by addressing them again.

III. DISCUSSION

6. It must be observed that all of the precedent cited by PAS relates to the Commission's consideration of reciprocity concerns with respect to dominant foreign-owned carriers. As PAS itself recognizes, TRT/FTC is classified as a non-dominant carrier for the provision of all services between the U.S. and all countries other than France. Since the circuit requested in the subject application is for TRT/FTC's provision of services between the U.S. and the United Kingdom, we shall consider TRT/FTC as non-dominant for the purposes of this proceeding. Moreover, we will limit TRT/FTC's authority to offer service "beyond" the United Kingdom to exclude authority to use this circuit to France.

7. As a result, we find that, with this limitation of TRT/FTC's authority, TRT/FTC's acquisition of the requested circuit will not constitute an expansion of the scope of TRT/FTC's operating authority. TRT/FTC has previously been authorized to provide service to the United Kingdom. Nothing in the application suggests that the requested circuit will be used to provide new services. Rather, TRT/FTC is requesting authority to acquire the subject circuit merely to satisfy increases in demand for its U.S.-United Kingdom services.[5] In view of the foregoing, and our decision to reaffirm the FTCC Ruling,[6] we

deny the PAS petitions to deny the instant application. Notwithstanding this action, we here reiterate our continued concern with PAS' inability to gain further entry to the French market.

8. The Commission stated in its Private Submarine Cable decision[7] that it would require common carriers wishing to acquire capacity in PTAT- 1 to file applications pursuant to Section 214 of the Communications Act.[8] In this context, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[9] Furthermore, we find that TRT/FTC's application does not raise any economic impact issues.[10]

9. Upon consideration of the applications and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that application File No. I-T-C-90-069 IS GRANTED, and TRT/FTC is authorized to:

a. acquire on an IRU basis, a one-half interest in one E-1 circuit in the PTAT-1 cable;

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide TRT/FTC's regularly authorized services between the U.S. and the United Kingdom and beyond with the exception of France.

11. IT IS FURTHER ORDERED that the Petition to Deny filed by PAS is hereby DENIED.

12. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] TRT/FTC recently merged with FTC Communications, Inc. (FTCC) with TRT/FTC being the surviving company. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC, from the Chief, International Facilities Division. In FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling*), because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier*). However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. As a result of the merger, TRT/FTC is now deemed to be a dominant carrier for the provision of all services between the U.S. and France.

[2] *See* AT&T Co., 98 FCC 2d 440 (1984) and American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988). We also note that FTCC, which has been merged into TRT/FTC, previously has been authorized to acquire circuits in the PTAT-1 cable system. *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989) and FTC Communications, Inc. DA 90-748, File Nos. I-T-C-90-019 and I-T-C-90-033 released June 1, 1990.

[3] *FTCC Ruling*, *supra* note 1.

[4] *See supra* note 1, 102 FCC 2d at 843.

[5] Indeed, if TRT/FTC were acquiring the subject circuits in any facility other than a private cable system or a private satellite system, it would not even be required to request authority to acquire them but, rather, could merely report their acquisition and use pursuant to Section 63.10 of the Commission's Rules. *See International Competitive Carrier*, 102 FCC 2d at845.

[6] *See* Memorandum Opinion and Order, File No. I-S-P-89-003, DA-90-747, released June 1, 1990.

[7] Tel-Optik, Ltd., 100 FCC 2d 1033 (1985).

[8] This requirement was restated in *International Competitive Carrier*, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[9] The Commission places no special burdens on any carrier making an application for private cable capacity. *See* Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies*).

[10] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of

whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-90-077

Application Requesting Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended to Acquire and Operate Facilities to Provide Common Carrier Services, Including Switched Message Telephone Services, Between the United States and Switzerland.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 25, 1990; Released: June 29, 1990

By the Chief, International Facilities Division:

I. INTRODUCTION

1. The above-captioned application, filed on March 16, 1990, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to utilize 12 64-kilobit per second (kb/s) circuits in the TAT-8 cable system for the provision of direct service between the United States and Switzerland. The application was placed on public notice on March 28, 1990. A Petition to Deny the application was filed by Pan American Satellite (PAS) on April 27, 1990. TRTI filed an Opposition to the Petition to Deny on May 10, 1990.

II. SUMMARY OF PLEADINGS

A. The TRTI Application

2. TRTI requests authority to utilize one-half interests in 12 64-kb/s circuits in the TAT-8 cable owned by TRT/FTC Communications, Inc. (TRT/FTC) on a cost flow-through basis.[1] TRTI also requests authority to untilize one-half interests in 12 64-kb/s circuits in facilities in France to extend the subject TAT-8 circuits to Switzerland. Use of these extension circuits will also be acquired on a cost flow-through basis from TRT/FTC.[2] TRTI states that it also will use 12 spare 64-kb/s circuits in optical fiber landline facilities between its New York, New York offices and the United States terminal of the TAT-8 cable it already leases from the American Telephone and Telegraph Company. TRTI states that it initially will use the requested facilities to initiate, and to provide jointly with its correspondent in Switzerland, switched message telephone services between the United States and Switzerland and beyond. TRTI indicates that these services will be provided by it principally through interconnection with domestic interexchange telephone carriers. Those interexchange telephone carriers will have the discretion to set the rates for their end-to-end services and will have the responsibility to file tariffs for such end-to-end services with the Commission. TRTI also proposes to provide service directly to end-users by means of the requested facilities pursuant to tariffs already on file with the Commission.

B. The PAS Petition to Deny

3. PAS opposes a grant of TRTI's application at this time. According to PAS, France Telecom, which owns a 14.9 percent equity interest in TRT through various subsidiaries and holding companies, has refused to consider any INTELSAT consultation for the PAS separate satellite system beyond the one-way video consultation (United States to France) that was concluded earlier. PAS states that France Telecom refuses to expand the present scope of United States-France service via separate systems despite clear customer interest in transmissions (both data and video) to and from France. Since the instant application proposes expansion of TRTI's operations within the United States, PAS asks that the application not be granted until France demonstrates that its telecommunications markets are open to all United States companies, including United States separate satellite systems. PAS observes that TRT has indicated that it will accept dominant carrier classification with respect to traffic to and from France upon completion of its proposed merger with FTC Communications, Inc. (FTCC).

C. The TRTI Opposition

4. TRTI states that it is a non-dominant carrier and that its classification is not subject to change by virtue of any pending proceeding initiated by PAS. [3] TRTI further states that PAS' petition confuses the abbreviations of TRTI and TRT/FTC to create the impression that TRTI has sought the Commission's consent to merge with FTCC and that TRTI has indicated, that, after the completion of the proposed merger, it will accept dominant carrier regulation with respect to traffic to France. TRTI indicates that the consolidated transfer of control contemplates the merger of TRT/FTC with FTCC with TRT/FTC being the surviving company. TRTI contends that TRTI will continue to be a separate corporate entity which the Commission has previously found should not be subject to dominant carrier regulation for any of its services. TRTI states that it would be unfair to hold hostage to the adoption of French government policies satisfactory to PAS the unrelated application of predominantly U.S.-owned and U.S.-controlled TRTI.

III. DISCUSSION

5. We would note at the outset that, as a result of the the recent corporate restructuring of the subsidiaries of International Communications Holdings, Inc., TRTI became a wholly-owned subsidiary of TRT/FTC. TRT/FTC was found to be subject to dominant carrier regulation with respect to its services to France. Because TRTI became a wholly-owned subsidiary of TRT/FTC and provides switched voice services, TRTI now also is deemed to be subject to dominant carrier regulation for the provision of all of its services to France.[4] However, TRTI is not deemed to be dominant with respect to the services it provides to any country other than France.

6. It must be observed that all of the precedent cited by PAS relates to Commission consideration of reciprocity concerns with respect to dominant foreign-owned carriers. As noted above, TRTI is not considered to be dominant for the provision of services to any country other than France. Since the circuits requested by the subject application are for the provision of service to Switzerland, we shall consider TRTI as non-dominant for the purposes of this proceeding. However, we will limit TRTI's authority to offer service "beyond" Switzerland to exclude authority to use these circuits for service to France.

7. We find that, with the above limitation, grant of the subject application will service the public interest by making available the benefits of increased customer choice in the international switched telephone services market. We disagree with PAS that grant of the instant TRTI application should be withheld until the French government adopts policies more favorable to separate satellite systems. Although we are concerned with PAS' continued inability to gain further entry into the French market, PAS has not sufficiently demonstrated how denial or deferral of the instant application would serve the public interest.

8. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of the requested facilities for the provision of direct service between the United States and Switzerland by TRTI.

9. Accordingly, IT IS ORDERED that application File No. I-T-C-90-077 IS GRANTED, and TRTI is authorized to:

a. utilize 12 64-kbps circuits of existing capacity in optical fiber landline facilities between the TAT-8 Cable terminal at Tuckerton, New Jersey and TRTI's New York office;

b. utilize on a cost flow-through basis a one-half interest in 12 64-kb/s circuits in the TAT-8 Cable presently owned by TRT/FTC;

c. utilize on a cost flow-through basis a one-half interest in 12 64-kbps circuits between the TAT-8 terminal in France and the border of Switzerland leased by TRT/FTC; and

d. use said facilities to provide common carrier services, including switched message telephone services, between the United States and Switzerland and beyond with the exception of France.

10. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Switzerland and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

11. The Petition to Deny filed by PAS is hereby DENIED.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Under the proposed arrangement, title to the subject TAT-8 circuits will remain with TRT/FTC. TRT/FTC also will retain the right to use the subject circuits for the provision of its services should TRTI no longer require their use in the future. However, appropriate accounting entries will be made to transfer to TRTI, the expenses and capital cost applicable to the TAT-8 circuits used by TRTI.

[2] These extension circuits were previously acquired by TRT/FTC on a 15 year Droits de Passage (DDP) basis.

[3] In particular, TRTI cites PAS' petition for reconsideration of a Commission decision that found that TRTI's affiliate, FTCC, would continue to be subject to dominant carrier regulation with respect only to its services with France. Relying on its difficulties with France Telecom, PAS' petition for reconsideration, which was denied in pertinent part by the Chief, Common Carrier Bureau, on May 21, 1990, sought reclassification of FTCC as dominant for all international services. *See* Memorandum Opinion and Order, File No. I-S-P-89-003, DA 90-747, released June 1, 1990.

[4] FTCC had previously been found to be dominant with respect to its services to France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. *See* FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car.Bur. 1989), *aff'd*, Memorandum Opinion and Order, File No. I- S-P-90-003, DA 90-747, released June 1, 1990. By virtue of its merger with FTCC, TRT/FTC became dominant for the provision of service to France. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-067-(5)AL and I-T-C-90-067-TC.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 29, 1990

SOUTHWESTERN BELL TELEPHONE COMPANY FILES PETITION FOR WAIVER REGARDING CCS/SS7 SERVICE

Pleading Cycle Established

On June 9, 1990, Southwestern Bell Telephone Company (Southwestern Bell) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a new switched access rate element for its signal transfer point (STP) port termination. This waiver would enable Southwestern Bell to charge interexchange carriers for access to its SS7 signaling network.

Interested parties should file comments regarding the Southwestern Bell petition for waiver no later than **July 10, 1990.** Reply comments should be filed no later than **July 16, 1990.**

An original and four copies of all petitions and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each pleading must be filed with International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Southwestern Bell's waiver petition and other related documents may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-565

In re Applications of

MEXICAN-AMERICAN COMMUNICATIONS ENTERTAINMENT BROADCASTING GROUP — File No. BPH-880113MA

For Construction Permit for a
New FM Station on Channel 258A
in Bryan, Texas

Appearances

Meredith S. Senter, Jr., Esquire, and *John B. Glicksman, Esquire*, on behalf of Mexican-American Communications Entertainment Broadcasting Group, and *Robert A. Zauner, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: June 25, 1990; Released: June 29, 1990

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, DA 88-1843, released January 10, 1989, the application of Mexican-American Communications Entertainment Broadcasting Group[1] (MACE) and Diversified Communications (Diversified) were designated for hearing on a comparative issue.[2] Thereafter, by *Memorandum Opinion and Order* of the Presiding Judge, FCC 89M-2672, released November 24, 1989, the following issue was specified against MACE:

> To determine whether Mexican-American Communications Entertainment Broadcasting Group, or any of its principals, filed false declarations in support of petitions to enlarge issues, and, based on the evidence adduced thereunder, whether MACE and its principals are basically qualified.

2. Prehearing conferences were held in this proceeding on March 21, 1989, December 14, 1989, and January 11, 1989. The hearing was held on this, as well as other issues, on March 20 and 21, 1990. [3] Following the conclusion of the hearing, MACE and Diversified entered into a settlement agreement pursuant to which the Diversified application was dismissed. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1697, released June 15, 1990.) MACE, as noted, seeks summary decision on the issue specified above.

3. Presently under consideration are a "Request for Leave to File Motion for Summary Decision" filed by MACE on May 2, 1990; a "Motion for Summary Decision" filed by MACE on May 2, 1990; and "Mass Media Bureau's Comments in Support of Motion for Summary Decision" filed by the Bureau on May 22, 1990.[4]

FINDINGS OF FACT

4. On February 17, 1989, following the release of the *Hearing Designation Order* in this proceeding, MACE filed a "Petition to Enlarge Issues" against Diversified. That petition raised questions about whether Freckles Broadcasting, Inc. (Freckles), licensee of Station KHRN(FM), Hearne, Texas, had made misrepresentations to the Commission by failing to install auxiliary power equipment at KHRN as it had promised in the comparative hearing for that station. Freckles is majority-owned and controlled by Joe Lee Walker and his wife Pamela Jean Walker, who are two of the three partners in Diversified. (Tr. 307-308.)

5. In connection with its petition, MACE submitted two declarations, both of which were signed by Gregory Rodriguez. Mr. Rodriguez is a general partner of MACE and was proposed to be integrated full-time into MACE's operation of its proposed Bryan station. (MACE Ex. 1 at paragraph 1; MACE Ex. 3 at paragraph 12.) A factual statement in the second of Mr. Rodriguez' declarations is the subject of the issue against MACE. (*Memorandum Opinion and Order*, FCC 89M-2672, released November 24, 1989.)

6. In the first of his two declarations, Mr. Rodriguez noted that he had worked at Station KHRN from May 1985 until September 1988. (MACE Ex. 2-1 at Attachment A.)[5] He also noted that, during his employment at KHRN, no auxiliary power equipment was installed at the studio or transmitter site and that, therefore, KHRN had no way to insure continued operation in the event of a loss of commercial power. (*Id.*) Mr. Rodriguez then stated that KHRN suffered losses of power on a number of occasions during his employment there, and, because of KHRN's lack of auxiliary power equipment, was unable to continue operating and so was temporarily off-the-air. (MACE Ex. 2-1 at Attachment A.)

7. In his second declaration, which is the declaration at issue here, Mr. Rodriguez stated that, to the best of his knowledge, information and belief, on Sunday, February 5, 1989, the power was off at KHRN, sometime between the hours of 6:00 a.m. and 9:00 a.m. (MACE Ex. 2-1 at Attachment B.) However, in its initial opposition to MACE's petition, Diversified submitted evidence that no power failure had occurred at KHRN on the date and at the time specified by Mr. Rodriguez. (MACE Ex. 2-1 at Attachments C-F.)

8. As part of MACE's reply to Diversified's opposition, Mr. Rodriguez submitted a third declaration, in which he corrected his second declaration and acknowledged that KHRN "may not have suffered a power loss on February 5, 1989." (MACE Ex. 2-1 at Attachment G.) Mr. Rodriguez reaffirmed, however, that KHRN was off-the-air that day sometime between the hours of 6:00 a.m. and 9:00 a.m. (*Id.*) He stated that he had based his belief that KHRN had suffered a power failure on his experience while working at KHRN. (*Id.*) During his employment at KHRN, the station was off-the-air due to power failure. (MACE Ex. 2-1 at paragraph 7.) During his employment

at KHRN, the station was also off-the-air due to transmitter problems that Mr. Rodriguez believed to be power failures. (Tr. 182-183.)

9. At hearing, it was established that KHRN was, indeed, off-the-air on February 5, 1989, sometime between the hours of 6:00 a.m. and 9:00 a.m., and this was confirmed by both Joe Lee Walker and Cruz Ramirez -- two of Diversified's three principals. (Tr. 155-156; Tr. 223.) According to Ms. Ramirez, who was responsible for putting KHRN on the air that morning, KHRN was off-the-air due to icy weather conditions, rather than any power failure. (Tr. 223.) In his testimony, Mr. Rodriguez acknowledged these icy conditions; he stated, however, that he believed that the existence of these conditions supported his conclusion that KHRN had suffered a power failure. (Tr. 181; MACE Ex. 2-1, paragraph 10.) Mr. Rodriguez also believed his conclusion to be supported by the fact that several other people confirmed that same day that KHRN had been off-the-air. (Tr. 167.)

ULTIMATE FINDINGS AND CONCLUSIONS

10. KHRN was off-the-air on February 5, 1989, sometime between the period from 6:00 a.m. to 9:00 a.m. But the station was off-the-air because of icy weather conditions, not because the station had experienced a power failure. Thus, Rodriguez was clearly in error in alleging in his declaration that the power was off at Station KHRN and this was the reason that it was off-the-air. Rodriguez knew that the station was off-the-air and assumed KHRN had a power failure. This assumption resulted from the fact that while Rodriguez worked at the station, it experienced power failures in the past, and he merely assumed that was again the reason the station was not on the air. Rodriguez was correct in alleging the station was off-the-air; he was incorrect in attributing this to a loss of power.

11. Rodriguez' mistaken belief that KHRN was off-the-air due to a power failure was not an unreasonable one under the circumstances. While Rodriguez may have been negligent in not investigating what actually caused the station to be off-the-air, there does not appear to be any intent on his part to deceive or mislead the Commission. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (1982); *modified* 93 FCC 2d 127, 129 (1983). In this connection, the facts alleged by Rodriguez were for the most part correct, and the erroneous statement about the power failure was quickly corrected when Rodriguez submitted another declaration. Because the facts do not reflect misrepresentation, only negligence and inattentiveness, which is not disqualifying,[6] the issue will be resolved in favor of MACE. In this connection, summary decision is appropriate where the presiding officer determines that there is no genuine issue as to any material fact. 47 C.F.R. Section 1.251(d); *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (1975); 32 RR 2d 1119, 1121 (Rev. Bd. 1975). In this instance, there is no genuine issue as to any material fact, and summary decision is therefore appropriate.

Accordingly, IT IS ORDERED that the "Request for Leave to File Motion for Summary Decision" filed by Mexican-American Communications Entertainment Broadcasting Group on May 2, 1990, IS GRANTED;

IT IS FURTHER ORDERED that the unopposed "Motion for Summary Decision" filed by Mexican-American Communications Entertainment Broadcasting Group on May 2, 1990, IS GRANTED, and the basic issue added against MACE IS RESOLVED in its favor;

IT IS FURTHER ORDERED that the application of Mexican-American Communications Entertainment Broadcasting Group (File No. BPH-880113MA) for a construction permit for a new FM station on Channel 258A in Bryan, Texas, IS GRANTED, subject to the following condition:

> Gregory Rodriguez shall divest himself of all interests in, and sever all connections with, Station KHRN(FM) prior to the commencement of program test authority.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] In the *HDO*, the name of this applicant, Mexican-American Communications Entertainment Group, was incomplete. By *Order* of the Presiding Judge, FCC 89M-1196, released April 17, 1989, the applicant's name was corrected to "Mexican-American Communications Entertainment Broadcasting Group."

[2] The application of Divcon Associates, Inc., was also designated for hearing, but this application was dismissed by *Order* of the Presiding Judge, FCC 89M-502, released February 14, 1989.

[3] A hearing was also held on the comparative issue on October 11, 1989.

[4] The Bureau's request for acceptance of its late-filed comments is granted, and its comments are accepted.

[5] The declaration actually stated that Mr. Rodriguez began working at KHRN in May 1988, rather than May 1985. However, this was due to a typographical error; the correct date is, in fact, May 1985. (MACE Ex. 2-1 at paragraph 3.)

[6] *See, Metro Broadcasting, Inc.*, 57 RR 2d 440, 445-446 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985, *held in abeyance*, 2 FCC Rcd 1474 (1987), 62 RR 2d 902 (1987), *reaffirmed*, 3 FCC Rcd 866 (1988), *rev. denied sub. nom., Winter Park Communications, Inc. v.* FCC, 873 F. 2d 347 (D.C. Cir. 1989), *cert. granted in part*, 58 U.S.L.W. 3427 (1990); *Benko Broadcasting Co.*, 3 FCC Rcd 6838 (1988), 65 RR 2d 1048, 1052-1053 (1988); F.B.C., *Incorporated*, 3 FCC Rcd 4595, 4597-4598 (1988), 65 RR 2d 263, 267 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-96

In the Matter of

Amendment of the Commission's Rules
Relative to Allocation of the
849-851/894-896 MHz Bands

REPORT AND ORDER

Adopted: April 12, 1990; Released: June 15, 1990

By the Commission: Commissioner Marshall dissenting and issuing a statement.

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1. By this action, the Commission amends its Table of Frequency Allocations and Part 22 of its Rules to permit the use of four megahertz of reserve spectrum at 849-851/894-896 MHz for a common carrier air-ground telephone service. This action also adopts an open entry licensing policy and establishes minimal technical guidelines for the air-ground telephone service. In a companion Public Notice, the Commission solicits applications to construct and operate the service.

BACKGROUND

2. In October 1984, Airfone, Inc. implemented an experimental air-ground telephone service under Part 5 of the Commission's Rules on a limited number of commercial aircraft. By early 1988, this service had expanded to include several hundred aircraft.[1] Owing to the success of the experimental service, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* on February 25, 1988, initiating the instant proceeding.[2] The *Notice* proposed to allocate the remaining four megahertz of 800/900 MHz reserve spectrum to an air-ground interconnected telephone service. [3]

3. The *Notice* stated that an air-ground service would provide accessible and useful communications to millions of domestic airline passengers each year. The *Notice* tentatively proposed to authorize two separate nationwide air-ground systems of two megahertz each and invited comment on the technical and economic viability of two systems. It also sought comment on whether the public interest would be better served under a more general mobile service allocation or a combination air-ground and general mobile allocation. The *Notice* further sought comments on the option of permitting air-ground licensees to offer ancillary services on frequencies not usable for air-ground service. Comments were also solicited with respect to whether the service should be offered on a common carrier or private basis.

4. The *Notice* proposed procedures and criteria for selection of licensees. It proposed that financial qualifications, technical qualifications, and service availability be used as qualifying criteria. It further proposed that comparative hearings be used to select licensees and solicited comments on whether applicants should be given comparative preferences based on various factors, such as experience. Finally, the *Notice* discussed technical guidelines for the service, stating that it should operate with maximum spectrum efficiency, and on a non-interference basis with adjacent services. While the *Notice* proposed no in-band technical standards for the service, it invited comment on this matter as well as on the question of limits on spurious emissions outside the four megahertz band.

DISCUSSION AND DECISIONS

Need for an Air - Ground Service in the 800 MHz Band

5. *Comments*. A total of forty-five parties filed comments and/or reply comments in response to the *Notice*.[4] Thirty of these parties generally favor the establishment of an air-ground service at 849-851/ 894-896 MHz, six are opposed, and nine are neutral.[5] The parties filing comments and/or reply comments are listed in Appendix B.

6. Parties supporting the proposal state that Airfone's experimental service has been highly beneficial, serving important business, personal, and emergency communications needs. These parties say that a permanent allocation for an air-ground service will expand communications to the 450-600 million passengers who travel on U.S. domestic airlines each year and provide an essential service rather than a mere luxury.[6]

7. More particularly, GTE contends that Airfone's experimental service has been very successful, even though it has experienced considerable interference and has largely consisted of inconvenient bulkhead phones on a limited number of aircraft. According to GTE, there is no doubt that usage of the service will rise substantially once it is permanently established, the full fleet is equipped for service, Seatfone[7] equipment is in place, and the quality of the system is improved. McCaw Cellular Communications, Inc. (McCaw) adds that air-ground service will meet important business, personal, and medical needs and be no more of a luxury than paging or cellular service. Continental Airlines (Continental) and others assert that it is an anomaly that in the sophisticated United States air transportation industry, in-flight consumers are currently denied the opportunity to stay in touch, except over experimental frequencies. According to Continental, the time has arrived for the FCC to match regulatory rules to economic reality and establish an air-ground service. Thirteen other airline companies offer similar comments.

8. Com/Nav Marine, Inc. (Com-Nav)[8] maintains that the Commission has relied upon six basic principles as guidelines in making frequency allocations: 1) need for spectrum; 2) greater emphasis on services necessary for safety of life and property; 3) number of people likely to be served; 4) public need and practical establishment of service; 5) appropriate frequency location based upon propagation characteristics; and 6) investment by public and industry in equipment.[9] Com/Nav submits that an air-ground service is justified on all these criteria since it must use spectrum, has potential emergency and public safety features, can serve large numbers of users, and can be established on a reliable basis.

9. The Charles McC. Mathias, Jr. National Study Center for Trauma and Emergency Medical Systems (National Study Center) states that it was designated by Congress in 1986 as the national center to 1) focus attention on those areas needing improvement in the delivery of systematic emergency care and to 2) serve as a resource center for information and data and technical assistance concerning emergency medical systems. National Study Center asserts that it has proposed the development of a nationwide airborne 911 emergency service to reduce the impact of sudden illness and injury that may occur during in-flight medical emergencies. It says that it initially proposed an airborne 911 service that depended entirely on cockpit communications; however, airline companies and airline industry associations voiced concern that such a service would disrupt flight operations. Without approval of the air-ground service, according to National Study Center, airlines probably will not be able to institute an industry wide, in-flight 911 emergency system.

10. The National Business Aircraft Association also supports the proposal for an air-ground service but suggests that it be available to private aircraft, and not just commercial aircraft. McCaw and Global agree with this suggestion. McCaw submits that private and smaller commercial aircraft number approximately 290,000 and argues that a large number of these aircraft would be expected to install the new air-ground service. Global-Wulfsberg Systems (Global) maintains that non-commercial needs should be met to the extent that spectrum congestion becomes a problem in the non-commercial Air-Ground Radiotelephone Service at 450 MHz.[10]

11. Opponents of an air-ground service at 800 MHz state that the service is a luxury, which the Commission has already rejected in GEN Docket No. 83-30, and that any demand for such a service can be met at higher frequency bands or via satellite services.[11] Land mobile radio organizations state that the 849-851/894-896 MHz bands should be allocated for land mobile use to alleviate what they contend is a shortage of spectrum for this type of use.[12]

12. The Land Mobile Communications Council (LMCC), Motorola, Inc. (Motorola), and the Utilities Telecommunications Council (UTC) contend that the need for additional land mobile spectrum, which is used for providing goods and services vital to the functioning of society, is much more critical than the need for an air-ground service. The Tri-State Radio Planning Committee (Tri-State Radio) maintains that as the six megahertz of spectrum allocated to public safety radio use is insufficient for the New York region and as the possibility of further sharing of UHF Television spectrum[13] is being held in abeyance until the spectrum needs of High Definition Television can be determined,[14] this spectrum should be made available for public safety.[15]

13. LMCC says that an air-ground service has already been rejected and that the argument that circumstances have changed since these decisions is without merit. According to LMCC, an air-ground service remains simply a convenience for a narrow segment of the population. The American SMR Network Association, Inc. (ASNA) adds that medical emergencies are the only essential service that an air-ground system would accommodate and that all commercial aircraft already have two-way communications systems to deal with these emergency situations. LMCC further contends that there has been no showing that an air-ground service cannot be accommodated at higher frequencies. It notes that the 1593-1594/1625.5-1626.5 MHz bands were recently allocated at the 1987 Mobile World Administrative Radio Conference (1987 Mobile WARC) for an air-ground public correspondence system and asserts that a mobile satellite service (MSS) will also provide air-ground service. In this connection, the National Association of Business and Educational Radio, Inc. (NABER) argues that a combination of the MSS and an aeronautical mobile satellite system called AvSat can adequately serve all air-ground needs.[16]

14. Parties that are neutral on the proposal indicate that an air-ground telephone service may have some value, but express concern about such issues as the adequacy of four megahertz of spectrum for this service, the preemption of state regulation, and the method of choosing air-ground licensees. Their specific comments on these issues are discussed below in other sections.

15. International Mobile Machines Corporation (IMM), in comments representative of several other neutral parties, states that it is not opposed to the establishment of an air-ground telephone service; however, IMM maintains that the Commission has erred in assuming that its *Report and Order* establishing the Basic Exchange Telecommunications Radio Service (BETRS) has resulted in sufficient available spectrum to make BETRS a viable service.[17] According to IMM, a discrete two megahertz allocation is needed for BETRS. It argues that this allocation could come from the General Purpose Mobile Radio Service (GPMRS) at 901-902/940-941 MHz, but that the air-

ground allocation should not be finalized prior to the FCC opening a rule making to reallocate the GPMRS to BETRS.

16. In response to those who contend that this spectrum should be used for other services or that the air-ground service belongs in another band, the supporters of the air-ground service argue that the spectrum needs of these other services have been sufficiently met. GTE contends that opponents of the service have understated air-ground requirements and overstated the requirements of their services. GTE believes that while all the requests of other services for spectrum, such as BETRS and private land mobile radio, may not have been met, the Commission has determined that their needs have been adequately addressed. Similarly, McCaw argues that land mobile radio has been provided with more spectrum than any other service and does not need additional 800 MHz spectrum. McCaw states that land mobile services have inefficiently used the spectrum allocated to them and contends that BETRS has no need for additional spectrum.

17. With regard to the possibility of providing the air-ground service in a higher band, such as the 1500-1600 MHz region (L-band), GTE contends that the L-band is neither technically nor economically feasible. McCaw adds that use of the L-band will not meet the Commission's goals for air-ground service due to a lack of sufficient spectrum as well as technical considerations. Finally, Com/Nav argues that the 800 MHz band is an appropriate location for the air-ground service because propagation characteristics in that band are essentially line-of-sight, with almost no atmospheric reflection. Higher bands, says Com/Nav, could create propagation problems due to the effects of weather. Additionally, Com/Nav notes that as there is no existing investment in the 849-851/894-896 MHz bands, these bands are a particularly good choice for the new service.

18. *Decision*. Based on the record in this proceeding, we are convinced that there is substantial untapped demand for an air-ground telephone service.[18] Allocating spectrum for an air-ground service will allow aircraft passengers to stay in touch with their homes, offices, and other locations at all times. Just as cellular radio has extended this capability to motor vehicles, an air-ground service will extend it to aircraft.[19] We recognize that like cellular radio, air-ground service may be considered a luxury by some individuals. However, as is the case with cellular, we believe its users view it in a different light. For example, just as real estate agents need their cellular telephone in order for their business to operate more efficiently, telephones in airplanes can greatly assist businessmen on long flights who need to communicate with their offices or customers. Indeed, an aircraft passenger may be airborne for a long period of time, and thus without access to the telephone network for several hours, while an individual in a motor vehicle generally has access to roadside equipment. Access to telephone service can be very important to both business and personal travelers confronted by unexpected situations such as flight delays. In addition, as noted by National Study Center, inflight communications can provide an additional means of emergency communications. Accordingly, we believe that the capability of maintaining communications while airborne can be particularly vital. Moreover, as the importance of telecommunications facilities grows in the business community, this service will become even more important in a manner similar to the evolution which has taken place with respect to paging and cellular radio.

19. We also reject the contention that air-ground needs can be entirely served by satellite systems. While it appears that domestic air-ground communications will be available via satellite in the future, we believe that terrestrial-based air-ground systems are sufficiently different to warrant our providing for their separate development. We note that the cost of providing such services via satellite is likely to be greater, at least initially, than the cost of such service over terrestrial-based facilities.[20] Also, there is a time-delay problem inherent in satellite communications that often makes two-way conversations more difficult than when terrestrial-based systems are used.[21] Because of these differences, we believe that to some extent the two types of systems will serve different markets. The satellite service will enable the provision of continuous service over ocean areas where it is not feasible to use a terrestrial system, whereas the domestic service may be able to provide a less expensive service over the continental United States and can be tailored to the needs of U.S. airline passengers. To the extent the two systems do serve the same market, the competition between the two systems will be healthy and should encourage lower prices and higher quality service to the consumer.[22]

20. We also find that our decision declining to provide for this service in the past does not require that we refuse to do so now. In the past we could not finalize an allocation for a terrestrial-based air-ground service because of the more pressing needs of other services, including mobile satellite, cellular, public safety, private land mobile radio, and BETRS. Today, however, all of these services have been granted allocations.[23] While the public safety interests may believe additional spectrum is needed in some areas, we continue to believe that our recent allocation of six megahertz to public safety adequately provides for this service for the immediate future and that any spectrum shortages that may result, such as Tri-State Radio contends will occur in the New York area, should first be addressed with efficient utilization of the spectrum already allocated.[24]

21. We also reject LMCC's contention that a terrestrial-based air-ground service could effectively operate in the two megahertz of L-band spectrum at 1593-1594/1625.5-1626.5. Aside from possible interference to other services that might result from air-ground use of these bands, we believe, as discussed in greater detail in the next section, that two megahertz is insufficient to satisfy both domestic and international air-ground needs.[25] We anticipate that, if the 1593-1594/1625.5-1626.5 MHz bands become heavily used for international air-ground telephone communications, U.S. carriers will provide aircraft that fly international routes with equipment capable of using these bands. We note, however, that most U.S. aircraft do not fly international routes. Finally, we note that some other countries, such as Canada, are strongly considering using the same 849-851/894-896 MHz bands that we are allocating herein for a domestic air-ground service.[26]

Amount of Spectrum Required for Air - Ground Service

22. *Comments*. Several parties state that demand for air-ground service will be insufficient to justify the four megahertz of spectrum proposed for the service. Bell Atlantic Mobile Systems, Inc. (Bell Atlantic) maintains that

to date demand for air-ground service has not been sufficient to warrant an exclusive frequency allocation. BellSouth Corporation (BellSouth) and the Cellular Telecommunications Industry Association (CTIA) make similar arguments, contending that there is no widespread public support for the experimental air-ground service. According to CTIA, even if all 3,500 commercial aircraft were equipped, usage of the system optimistically would increase to only about five million calls per year. To increase utilization of air-ground service and help justify the allocation, Bell Atlantic asserts, it would be useful to incorporate the capability to use portable cellular units on air-ground systems.

23. Motorola argues that air-ground market penetration will be far short of that projected; instead of 15-20 percent use by passengers, 5-10 percent may be the highest level that can optimistically be forecast. Motorola also contends that an air-ground system can be designed to operate more efficiently than that of GTE Airfone. It further claims that projected growth and demand can be accommodated within two megahertz of spectrum and with a quality of service equivalent to that of cellular service. Motorola therefore argues that it would be wasteful to allocate four megahertz of spectrum for an air-ground service. Rather, according to Motorola, it would be far more efficient to permit co-primary, low-power land mobile use on a shared basis with the air-ground service in two megahertz of spectrum and allocate the remaining two megahertz for new land mobile technology.

24. Other parties state that demand for air-ground service will easily be sufficient to use four megahertz of spectrum, even with more efficient technology. McCaw argues that CTIA's estimate of only five million calls per year is far too low because those projections do not account for aircraft not currently equipped to provide service and planned base stations not yet in operation. McCaw contends that at the time of CTIA's analysis, only 20 percent of all commercial passenger aircraft were equipped, and only 66 percent of Airfone's desired number of base stations were in operation. McCaw states that several studies have shown that between 15 and 30 percent of all passengers on commercial flights desire, and will use, an air-ground service when it becomes available in its mature technical form, generating a minimum of 90 million calls per year. Furthermore, according to McCaw, as air-ground telephones become smaller, more streamlined, and less costly, a large number of non-commercial and smaller commercial aircraft can be expected to install air-ground service. McCaw states that these aircraft number approximately 290,000.

25. GTE asserts that its models show that four megahertz of spectrum is necessary to serve the portion of the air-ground market that will not be served by satellites. GTE projects air-ground usage in the 15-20 percent range, and says that its models consider, in addition to the market share of satellite-based competitors, airline flight schedules, the type of aircraft and its average and peak number of passengers, the number of aircraft equipped for service, and average call duration. GTE estimates the satellite share of the market to be 30 percent and contends that four megahertz of spectrum allocated to a single air-ground provider using extremely efficient technology will be necessary to serve the remaining 70 percent of the market.[27]

26. *Decision*. We believe that McCaw, GTE, and others make a strong case that four megahertz of spectrum will be needed to serve the large portion of the air-ground market that will not be served by satellites. While projecting both total air-ground demand and the percentage that will be served by satellites is somewhat speculative, we are impressed by the strong growth of GTE Airfone's experimental system. We note that this growth has occurred despite the inconvenience and technical problems of the experimental nature of the service and the additional considerations that the service has not been widely advertised and is currently rather expensive.[28] We are confident that a mature air-ground service will generate a far greater volume of calls per aircraft than at present, and that this increase, coupled with the expansion of service to the large number of aircraft not currently equipped, will lead to a vast increase in the number of air-ground calls. For the reasons given by McCaw, we are convinced that CTIA's projections are far too low and that McCaw's projections are more on target. We also believe that satellite systems will operate at enough of a competitive disadvantage on U.S. domestic routes that they will capture much less than half of the market, thus leaving the large majority of domestic air-ground demand to be satisfied by a terrestrial system or systems. Accordingly, we are allocating the entire four megahertz of spectrum under consideration here to a terrestrial-based air-ground service.

27. Moreover, we are confident that there will be sufficient demand for the service without our mandating that the air-ground telephone system be compatible with portable cellular units. While we agree with CTIA and others that benefits could be realized via the use of cellular portables on aircraft, the same is also true of other portable radio devices, such as pagers. Under the market structure that we are adopting, the possibility of compatibility with terrestrial cellular systems at some future time does exist.[29]

28. Nevertheless, as our decision is necessarily based upon prediction, we also wish to emphasize that should the spectrum that we are herein allocating to the air-ground service be underutilized, we may initiate a rule making to reallocate the spectrum, or a portion thereof, to another service. As the comments above indicate, there is some controversy concerning the need for four megahertz in the 800 MHz band for the air-ground service. We intend to monitor use of this allocation carefully to ensure that the public interest is adequately served. In particular, we will seek additional information on the utilization of the spectrum and consider the need for periodic reports, for a limited period of time, regarding the loading of each licensee's system.

Regulatory Status of Air - Ground Service

29. *Comments*. The *Notice* stated that air-ground service "could be offered either as a common carrier service or as a private telecommunication service."[30] Virtually all the commenters addressing this issue favor common carrier regulation, and no party contends that the air-ground service should be subject only to private carriage regulation.[31] Several commenters, including Com/Nav, McCaw, and Telocator, cite the *NARUC I* and *NARUC II* decisions as reasons for applying common carrier regulation.[32] In *NARUC I*, the court stated, *inter alia*, that "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve."[33] In *NARUC II*, the

court stated that a "second prerequisite to common carrier status . . . is the requirement . . . that the system be such that customers transmit intelligence of their own design and choosing."[34] Parties favoring common carrier regulation state that the air-ground service will be available to all passengers on an unrestricted basis. Further, they contend that no specific groups of passengers have been identified that would warrant private regulation. Telocator adds that public policy, logic, and the experience with the experimental system indicate that this service will be provided indifferently to all aircraft passengers.

30. In addition, Telocator argues that the Commission's recent decision in the context of the Specialized Mobile Radio service, that a service held out indifferently to the public may nonetheless be a "private" service has no relevance here.[35] That decision, Telocator asserts, interpreted Section 331 of the Communications Act, which applies only to private *land* mobile service that are not interconnected to the public switched telephone network, except under the conditions provided in that section. Nevertheless, while Telocator believes that the air-ground service should be regulated on a common carrier basis, it requests that the Commission specify that it will forbear from applying the full panoply of common carrier regulations to the air-ground service.

31. While Geostar believes that some air-ground communications services are more properly characterized as nondominant common carrier operations, it believes that others will meet the *NARUC I* criteria for noncommon carrier operation. Accordingly, Geostar requests that the Commission provide air-ground licensees with the flexibility to provide both common carrier and noncommon carrier communications services over the same system.

32. Parties favoring common carrier regulation also generally argue that the Commission should preempt state regulation of authority over rates, conditions of entry and exit, and technical and operational standards.[36] GTE contends that the FCC should have exclusive jurisdiction over the regulation of the service because it is impossible to determine the jurisdictional nature of calls placed. GTE asserts that Airfone's on-board communications system is not capable of identifying the location of the aircraft when a call is originated; therefore, GTE reasons that all calls must of necessity be treated as interstate. Further, McCaw contends that if licensees providing air-ground service are required to meet different rate, entry, or technical requirements for each state, air-ground service could be subject to conflicting regulation that would inhibit its operation. According to McCaw, the clearest case for preemption of state regulation is made where conflicting regulations could apply different rates during different segments of a communication or prevent a carrier from providing service in all states.

33. The National Association of Regulatory Utility Commissioners (NARUC) and the People of the State of California and the Public Utilities Commission of the State of California (PSC/PUCSC) maintain that in some states, such as California, the points of origin and termination of calls from in-state air flights can be readily discerned for jurisdictional purposes. Both parties argue that even if calls are routed to a ground station in an adjacent state, the calls would be intrastate in nature. According to NARUC, therefore, FCC preemption of state jurisdiction would violate the dual jurisdictional scheme.

34. *Decision.* We concur with those commenters who state that air-ground service should be regulated on a common carrier basis. Prospective air-ground licensees are virtually unanimous in this regard. These entities indicate that they would offer the service indiscriminately to the general public, thus meeting the *NARUC I* test. Furthermore, no party suggests that the service would be offered on a restrictive basis by the airline or where the supplier establishes accounts that are individually negotiated and styled to meet the needs of particular user groups. Geostar does favor licensee flexibility to choose private or common carrier regulation, but it does not indicate that it is a prospective licensee nor does it describe any air-ground communications that could satisfy the *NARUC I* test for private regulation. Therefore, the service seems to us to fall within the domain of common carrier regulation. However, in processing applications, we will permit applicants to make a waiver showing that some of their air-ground services should be regulated on a private carrier basis.[37]

35. Further, we find that the air-ground service providers should be considered nondominant. In light of our decision discussed in paragraphs 60-73, *infra*, to provide for multiple entry and as these licensees will face some, although limited, competition from satellite systems and the non-commercial air-ground system at 450 MHz, commercial air-ground licensees at 800 MHz do not appear to have the ability to exercise power in setting prices above competitive costs to earn monopoly profits. While a particular airline customer may have only one service provider to choose from on a particular flight, we believe that the airlines will have incentives to act on behalf of their customers to choose among service providers in a manner that provides high quality service at low prices. By acting in this manner, airlines will maximize their ability to use the air-ground service to compete with other airlines for customers. Accordingly, we will treat the providers as non-dominant under our *Competitive Carrier Rule Making* [38] and subject them to streamlined regulation.[39] However, we may need to reconsider this decision in the unlikely event that only one entity ultimately provides air-ground service. Thus, at this time, we intend to regulate the rates of the air-ground service providers on a streamlined basis.

36. It appears that air-ground service will largely be an interstate communications service and, therefore, largely not subject to state regulatory jurisdiction. Moreover, with respect to technical and operational standards, it is clear that the Commission has exclusive jurisdiction, regardless of whether the calls are interstate or intrastate in nature. *See, e.g.* 47 U.S.C. Section 301, 302. We recognize, however, that on some flights, some calls between two parties in the same state, *i.e.* intrastate calls, might be made and that states could conceivably assert jurisdiction over rates and conditions of entry and exit with respect to such intrastate service. Based on the record before us, however, it appears that it is not feasible to identify the originating point of calls made during an interstate flight and that state regulation of any intrastate service on interstate flights is thus not feasible without serious impediment to federal regulation of interstate calls. Accordingly, we are preempting state regulation of rates and conditions of entry and exit with respect to intrastate calls on interstate flights.[40] Identification of the originating (as well as terminating) point of intrastate calls on intrastate flights does appear feasible, however. Accordingly, in regulating such

service, we see no reason at this time to preempt state rate or entry/exit regulation with respect to intrastate calls on intrastate flights. Of course, if a problem develops, we can revisit this issue in the future.

Number of Air - Ground Licensees

37. *Comments.* In the *Notice*, we stated that we were proposing to authorize two separate nationwide air-ground systems of two megahertz each. While we recognized that it might be more advantageous technically to authorize a single air-ground system, we believed that fostering two competing systems would better serve the public.[41] In addition to this approach, some commenters have argued that a single air-ground licensee would be more reasonable, while other commenters have advanced a proposal for sharing the spectrum among all parties interested in providing air-ground service.

38. Proponents of a single air-ground licensee cite the limited amount of spectrum proposed to be allocated and the cost savings that can be achieved from having only one ground network. According to these parties, two licensees would make inefficient use of the spectrum since they would be limited to two megahertz each and would not be able to operate cost-effectively. Thus, GTE, the major proponent of this theory, states that based on models constructed from data generated by its Airfone experimental program, two megahertz is not viable for an air-ground system. It contends that from a technical standpoint, the maximum traffic carrying capacity that can be derived from two megahertz of radio spectrum will be insufficient to accommodate the levels of passenger usage that will occur when an air-ground system is fully deployed and still maintain an acceptable grade of service. GTE adds that total traffic capacity of two systems would be 14.2 percent less than a single four megahertz system.

39. According to GTE, the economic viability of two systems is also not very promising. GTE says that Airfone has spent well in excess of $100 million to develop its technology, construct a nationwide network of ground stations, and equip less than a quarter of the commercial airline fleet. It contends that under any reasonable assumptions, the revenues that could be generated by two systems within a reasonable period of time simply cannot support such expenditures. Moreover, GTE argues, there would be no pricing actions that two licensees could take to solve their revenue problems. Any effort to increase market share and revenues by lowering prices would be counterproductive: the capacity of its system would soon be exceeded by the higher usage levels. Conversely, according to GTE, given the competition from satellite-based and terrestrial-based alternative services, prices could not be raised sufficiently to suppress demand to match the traffic-carrying capacity of two systems and still produce enough revenue for the operator to achieve an adequate break-even positive cash flow point within a reasonable period of time.

40. According to GTE, two licensees with equal market shares and a 15 percent usage level would not reach a financial break-even point until the end of year eight or beginning of year nine. Given a 50-20 split of the market between the suppliers, GTE argues, the higher supplier would provide such poor quality service that call volume would be reduced and with it, revenue and economic payback. Under this scenario, GTE says that the break-even point would be further delayed. By contrast, GTE states, a single four megahertz supplier at a 15 percent usage rate would recover its initial investment early in year seven.[42]

41. American Airlines (American) similarly asserts that two systems would fragment the four megahertz of spectrum and might prevent either system from providing adequate service. American says that any company other than GTE Airfone would have to "reinvent the wheel" and set up a duplicative system of earth stations and on-board equipment. American contends that space, weight, and power limitations of aircraft preclude obtaining meaningful competition through the placing of competing systems on the same aircraft.

42. National Study Center contends that one integrated system would better promote a new emergency medical service, whereas two separate systems would delay such a service because of coordination problems. Without adequate bandwidth, according to National Study Center, it is unlikely that the communications provided by air-ground telephones would be reliable for emergency medical situations. National Study Center further states that the current experimental system now provides the basic technology for an in-flight 911 system. It says that the components are present, and if a permanent licensee is chosen, nationwide services could be initiated within 90 days. However, according to National Study Center, if another company must begin installation of equipment and multiple interfaces develop, the service may take years to come into use.

43. Finally, single-licensee proponents say that some terrestrial services can be substituted for air-ground service and that satellite services will provide direct competition to an air-ground licensee, so that there is no need to attempt to artificially introduce competition between air-ground licensees. For instance, GTE argues that airline passengers are by no means captive to a telephone on an aircraft, contending that airport pay phones, cellular phones, and pagers can be used before and after flights. GTE further asserts that the Commission should not be concerned about granting monopoly power to a single air-ground licensee since there will be competition from satellite-based air-ground systems. In addition, American suggests that the airlines can adequately handle the monopoly power of a single air-ground licensee. It argues that it closely monitors all independent providers that serve its customers. According to American, it has the ability to deal with the provider if service degradation or pricing policies lead to consumer complaints.

44. Parties favoring two nationwide systems argue that there are no technical or economic reasons to preclude competition in air-ground service. While these parties generally concede that two systems might lessen spectral efficiency marginally, they contend that the benefits of competition in terms of innovation and higher quality service far outweigh this slight loss in efficiency. These parties also argue that satellite services will be at a competitive disadvantage in providing air-ground service for both economic and technical reasons.

45. McCaw says that it commissioned an engineering study to assess GTE's technical claims and that this study concluded that GTE's assertion that two air-ground systems cannot operate within four megahertz should be rejected for two reasons.[43] First, the difference in channel capacity with two systems rather than one system, even accepting Airfone's assumptions, is not significant. According to the study, a 14.2 percent reduction in projected

channel capacity if two systems are allocated, rather than one system, is the same size reduction accepted by the FCC when it allocated spectrum for two cellular systems, and much less of a reduction than when the Commission authorized two Improved Mobile Telephone Service providers. Second, in the study's view, the increases in spectrum efficiency that would result from technical improvements generated by the competition between two air-ground systems would more than offset the decrease in channel capacity created by the introduction of a second system.

46. McCaw states that it also commissioned an economic study of GTE's financial claims.[44] According to this study, even if GTE's factual assumptions and analysis are correct, the economic viability of two systems does not differ markedly from one system. The study notes that GTE uses the time it takes for one or two systems to break even as a measure of investment return, but that this is improper. Nonetheless, the study asserts, only relatively trivial differences are found for the timing of reaching positive cash flow and break-even dates in GTE's analysis. Furthermore, according to the study, under the assumptions used by GTE for a two megahertz system, the rate of return to investment for a fifteen percent air-ground usage rate is 16.5 percent and for a twenty percent usage rate is 25.1 percent. Both of these returns, the study argues, are significantly above market interest rates. Also, the study contends, GTE uses Airfone's historical costs to estimate a new entrant's costs, but the new entrant would not have to duplicate all of Airfone's research and development costs. Finally, the study states, the new entrant could also make use of its established mobile facilities to save on capital costs, and competition between the two carriers would likely foster cost economies, adoption of state of the art equipment, and innovative marketing and organizational efforts to lower cost and raise revenue, thus increasing return to investment.

47. Global states that there are no equipment-related limitations that would preclude an airline from making competing terrestrial air-to-ground systems available to its passengers. Global contends that the option of choosing between two air-ground systems could be made available through the use of equipment that employs an "A/B switch". While equipment employing such a switch may be somewhat heavier than single system equipment, Global states, its weight would be considerably less than two separate units.

48. Finally, Com/Nav states that an air-ground service does not present any special circumstances which would lead the Commission to make this service an exception to the general presumption in favor of competitive entry. According to Com/Nav, if only one system is licensed, there will be no impetus for development of more efficient systems and little incentive to expand the service to less desirable air routes. Com/Nav further contends that contrary to GTE, there are no truly substitutable services available to airline travelers which can be used in the same manner or for the same purposes as air-ground telephones. Com/Nav says that the services which GTE asserts will be competitive with air-ground are either not comparable because they are terrestrial-based or are still in early developmental stages.

49. As a third alternative, the Goeken Group Corporation (Goeken) proposes an open entry sharing plan that makes the four megahertz of spectrum available to all interested parties on an equal, shared basis. Goeken contends that while numerous entities might wish to provide service, the actual number of providers will be limited, because only those entities that are able to establish service agreements with a sufficient number of airlines to make operation economically viable will actually request a license and become operational. It maintains that its plan reduces the loss of spectrum efficiency resulting from multiple air-ground networks by allocating channels dynamically between service providers according to real-time demand. Also, Goeken states, the plan would permit sharing by the private land mobile radio services.

50. More specifically, the Goeken plan would use the present ten 200 kHz channel subgroup pairs and basic base station network used by GTE Airfone's experimental system as its starting point. The plan would divide each current 14 kHz pilot channel used by Airfone into four 3.2 kHz pilot channels and a guardband of 1.2 kHz between the last pilot channel and the first communications channel.[45] According to Goeken, this arrangement would permit up to four service providers to access the present thirty-one 6 kHz communications channels within each 200 kHz subgroup. Although Goeken does not believe that more than four licensees are likely, additional pilot channels could be created using the communications channels, if necessary. Under the Goeken plan, service providers would be free to select their own modulation schemes and could reduce the present 6 kHz communication channel bandwidth to 2-3 kHz to double or triple channel capacity.

51. Under Goeken's proposal, new service providers would be required to locate base stations within one mile of the existing GTE base station network to prevent adjacent channel interference that would result from Doppler frequency shifts, and all providers would coordinate their systems with each other. A new base station could be added to the basic cell layout if the ground station channel were not used by any other air-ground provider within 550 miles. When a licensee requires a communication channel, it would lock on to a vacant channel and retain control of that channel until either a "hang-up" signal is given or a 15 second delay occurs, indicating that the channel is no longer being used. The Goeken plan would also allow air-ground frequencies to be shared with private land mobile radio services following a 12-36 month period to permit a competitive air-ground service to mature and settle in. The uplink communications channels of air-ground base stations located at distances greater than 550 miles from a designated area would be available for sharing, as would air-ground downlink frequencies (894-896 MHz band) located at distances greater than 80 miles from an air-ground base station.

52. Three parties challenge the acceptability of the Goeken plan. Sky Cell asserts that the numerous technical restrictions proposed to implement the Goeken plan--principally radio frequency parameters and site co-location--would effectively lock in GTE Airfone's system technology, which is obsolete and inefficient, and inhibit the development of advanced air-ground technologies. Specifically, Sky Cell questions the plan's channel spacing, bandwidth, and reuse plan, and states that, in a competitive environment, service providers would have strong incentives to use differing base station layouts based upon system efficiency, airlines served, and dynamic channel allocation algorithms.[46] Under the Goeken plan, Sky Cell contends, each system operator would need the approval and cooperation of the other operators for

any unilateral system modifications, and all such changes would necessitate technical coordination to protect against interference.[47]

53. GTE states that serious questions remain unanswered as to the Goeken plan's land mobile sharing analysis, the workability of the proposed pilot channel plan, and the reasonableness of assuming that suitable ground station sites all within short distances of each other could be located for multiple licensees. The most important deficiency of the Goeken plan, in GTE's view, is that the extensive technical coordination required among suppliers by the plan would result in suboptimal system planning at the outset of the permanent service and would substantially reduce incentives to introduce technological or system improvements as the service matures.

54. GTE asserts that the Goeken plan would require major and immediate changes to Airfone's ongoing operations and system design--changes that would affect aircraft equipped with Airfone equipment and all ground stations. At a minimum, according to GTE, every radio transceiver would require modifications to operate on the modified pilot frequency, and additional equipment would have to be developed to monitor and "busy out" voice channels that are in use. GTE further argues that Goeken's sharing plan with private land mobile radio users does not adequately take into account interference from aircraft to land mobile radio ground stations and mobiles.

55. In essence, according to GTE, the Goeken plan would produce a cartel-like industry structure, wherein the freedom of a service provider to implement technical innovation and new services would be severely curtailed. For example, asserts GTE, a shift from six kHz to five kHz channelization would be very unlikely, since some service providers would not need the additional capacity, and thus, would not be willing to invest to make such a change. In the past, contends GTE, the Commission has recognized the serious disadvantages of industry structures that require excessively close technical coordination among suppliers.

56. Mtel argues that the Goeken plan is preordained to limit the air-ground market to Goeken and GTE and that such an industry structure would result in the entrenchment of an increasingly outmoded analog technology. According to Mtel, air-ground system improvements can be implemented much more easily in a digital environment that relies on software-defined transceivers than in an analog environment, in which transceivers are defined by specific electronic circuit modules rather than by software. If the Goeken narrowband channelization scheme is implemented, Mtel asserts, it would virtually preclude the possibility of wideband digital techniques such as Time Division Multiple Access (TDMA). In summary, Mtel argues that the Goeken plan rests largely on the existing technology and base station arrangement used by GTE and presupposes that GTE will be one of the licensees. Such an arrangement, Mtel states, is unfair, and also assumes that land near airports can be purchased by competing service providers. Thus, in Mtel's view, the Goeken plan does not provide for open entry, but merely legitimizes an experimental process that has exceeded normal procedures.

57. In reply to Sky Cell, GTE, and Mtel, Goeken asserts that these parties misunderstand its plan. Goeken contends that the plan does not sacrifice system capacity, efficiency, upgradability, or flexibility. Rather, it says, the plan offers all the benefits of new narrowband digital technologies while still being compatible with the existing experimental system. While its plan would prevent the introduction of wider band TDMA technologies, Goeken asserts that these technologies are illogical for an air-ground system, since the amount of spectrum is limited. It also maintains that the plan would allow licensees to introduce new technologies to the market without the need for constant coordination, as alleged by the other parties. Regarding the allegation that ground stations would have to be virtually co-located with Airfone's current experimental layout, Goeken asserts that very similar locations are only logical, since any ground station network would have to be located in close proximity to airports. Goeken further asserts that this is an easy requirement to meet, since any hotel roof in close proximity to an airport would probably be suitable for a ground station.

58. Two parties favor regional air-ground systems. BellSouth states that, while two nationwide systems would appear the least complex approach from an administrative standpoint, the Commission should also consider regional systems. According to BellSouth, with more carriers participating in the service, there will likely be greater innovation in solving the wide array of problems to be faced in establishing this service, including billing methods, marketing, choice of technology, etc. Puerto Rico Telephone Company also supports regional systems, stating that a licensee providing service to the contiguous 48 states would not have the incentive or capability of providing service to other areas.

59. Com/Nav and McCaw specifically oppose regional systems, stating that the service should be required to be nationwide for technical reasons. According to Com/Nav, the designation of the appropriate carrier to handle a call, the maintenance of the call for a reasonable time period while the aircraft moves into an adjoining region, and the billing of the call, if it is carried over two networks, are matters which will only add to the complexity of the systems that will be in place. Com/Nav contends that the regionalization of the service would require the institution of hand-off and coordination specifications, and would necessitate administrative rules such as cost separations and billing coordination.

60. *Decision*. As the commenters demonstrate, there are concerns about the feasibility and/or desirability of each of the three major alternatives. The single licensee approach fails to provide for direct competition. Direct competition in the marketplace helps to ensure that the public is charged reasonable prices and that the licensee has an incentive to use efficient spectrum technologies. While the two system and open-entry approaches resolve our concerns regarding pricing, they raise other problems. The two system approach can be spectrally inefficient to the extent that one licensee may get more or less spectrum than it requires. An open-entry approach to licensing avoids this pitfall, but may restrict the ability of licensees to use new technologies. Accordingly, our reasoning on this issue requires a balancing of competing considerations.

61. Initially, we agree with those parties favoring competing nationwide air-ground systems. Historically, the Commission has favored competition whenever feasible. Competition helps to ensure that rates are reasonable and that the motivation exists for licensees to use new technologies in order to improve their systems. We reject GTE's

contention that satellite-based air-ground systems and terrestrial services, such as pagers and airport pay telephones, are competitive alternatives to terrestrial-based air-ground service. We have already detailed in paragraphs 19 and 26, *supra*, why we believe satellite-based systems will not, for the most part, provide effective competition to terrestrial air-ground systems. Regarding other terrestrial services, while such communications can be scheduled before or after flights, generally these services are extremely poor substitutes for in-flight communications because of the inherent time delays. Indeed, if these were adequate substitutes, there would be little point in our allocating spectrum for the air-ground service. In conclusion, while we believe that satellite-based air ground systems and other terrestrial services can provide a limited check on the exercise of market power by a terrestrial-based air-ground licensee, we are convinced that only the existence of competitive terrestrial air-ground systems can produce the lowest prices and highest quality service to domestic airline passengers.

62. Furthermore, GTE has not persuaded us that competing systems would not be economically viable. As noted by McCaw and others, GTE's models, even if accurate, do not necessarily lead to the conclusion that economically there can be only one air-ground system. The technical and economic benefits of one system that emerge from these models do not take into account innovations that may arise due to competition. As the public becomes more aware of the air-ground service, we expect that competition will lead to reasonable prices.

63. We also find that nationwide systems are preferable to regional systems for the air-ground service. First, in contrast to the cellular radio service, the air-ground service is inherently nationwide in scope as many airlines today serve large portions of the United States rather than a single region. Indeed, any attempt to regionalize the air-ground service would be arbitrary. Second, regional systems could unnecessarily create problems for air-ground licensees and expenses for the users. For instance, frequency and billing coordination would be required between different service vendors. Such coordination is much easier, and thus cheaper, within a single system. Further, regionalization would necessitate our developing uniform equipment standards. This would only delay the implementation of additional service to the public as the installation of additional equipment would certainly cease pending the development of technical equipment standards. Finally, the only apparent benefit to be achieved from regionalizing the country would possibly be to provide some assurance that the air-ground service is offered throughout the United States. As discussed in paragraph 81, *infra*, we will be requiring that all air-ground providers establish nationwide systems. Thus, we believe that this concern is otherwise adequately addressed.

64. The choice left to us, then, is between authorizing two competing air-ground systems as proposed in the *Notice* or adopting the Goeken Group's alternative open-entry sharing approach. On balance we favor Goeken's open-entry sharing approach.[48] Under this approach, the spectrum does not have to be divided arbitrarily between two service providers such that one may get less spectrum than it requires, while the other provider gets more than it needs. Rather, success in a competitive market will, under our approach, tend to determine spectrum use. Further, an open-entry approach will permit more than two competitors and, as these competitors seek users, ensure that all air routes, even some smaller, less desirable ones, are served. While GTE has raised concerns regarding the feasibility of multiple entrants, as explained in paragraph 62, *supra*, we believe that multiple entry is economically and technically viable. Given the interest expressed in the comments, we anticipate that a market of several service providers will develop. The public will benefit from this approach because as discussed in paragraph 35, *supra*, the existence of multiple service providers will encourage airlines to choose a service provider with low-priced and high-quality service. The possibility that some service providers ultimately may not succeed does not detract from our conclusion that maximizing competition is in the public interest.[49]

65. We recognize that the open-entry approach may have some disadvantages. For instance, as several commenters note, it may restrict technical and operational flexibility somewhat. As discussed by Sky Cell and Mtel, the open-entry approach would initially create an industry structure based largely upon the technology and ground station arrangement of the current experimental service. It would, therefore, initially limit potential service providers to certain technologies and a ground station plan consistent with that of the experimental system. For example, adoption of the open-entry approach may initially preclude the TDMA technology discussed by Mtel.

66. Despite these limitations, we believe that the open entry plan would still provide all service providers with substantial flexibility. For instance, a service provider could adopt a narrowband digital technology using Frequency Division Multiple Access (FDMA). Also, once the service became established, the possibility of all service providers agreeing to switch to a substantially different technology would exist. For example, if one of the licensees could demonstrate that it could significantly increase spectrum efficiency and lower costs via use of a new technology, it would be logical for all air-ground providers to change to this technology. Moreover, we do not consider the preclusion of TDMA technology to be a significant concern. At present, we agree with Goeken that an FDMA technology is preferable to a TDMA technology for use in air-ground communications. We are aware that the cellular industry has set forth a plan to utilize a TDMA technology in the next generation of cellular systems. However, the land mobile operating environment is significantly different from the aeronautical mobile operating environment. Furthermore, the chosen cellular technology produces the equivalent of only three channels in the current 30 kHz bandwidth. While this is an impressive improvement from just one channel in 30 kHz, the technology currently used by GTE Airfone in its experimental air-ground system allows for five channels in 30 kHz.

67. Additionally, although the open-entry plan would initially preclude operating the air-ground service with a small cell structure such as suggested by Sky Cell, we are not convinced that this approach is feasible at present. Essentially, the Sky Cell approach would use the technology now being developed for the next generation of cellular systems; *i.e* 30 kHz channeling with TDMA to allow three discrete communications channels, a dynamic channel assignment technique based on monitoring the field strength of signals, and small cells featuring automatic handoff. Specifically, Sky Cell's approach would use cells

as small as 10 miles in radius as opposed to the 150 mile radius cells that would be used under the Goeken open-entry plan.

68. While such an approach cannot be summarily dismissed, we note that small cells for use in air-ground communications create major cost and efficiency concerns due to the expense of cell construction and the number of handoffs that would be required; *e. g.* an aircraft flying at 600 miles per hour would pass through the diameter of a 10 mile radius cell in two minutes. Sky Cell has not demonstrated that the complex frequency management task such rapid handoffs would create is feasible. Also, Sky Cell has not adequately explained how its channel assignment technique would work; *e.g.* it has not explained how the technique would account for variations in propagation. We are therefore not convinced that Sky Cell's approach is either technically or economically viable at present. However, we note that this approach may ultimately prove feasible, and we encourage the air-ground licensees to consider converting to it, if they become convinced that it would be superior to the initial technical structure, as discussed in paragraph 66, *supra*, and paragraph 105, *infra*.

69. In addition, with respect to technical limitations imposed by the open-entry plan, we note that regardless of what method we select to implement air-ground service on a permanent basis, some temporary "freezing" of technology is inevitable. Each method of authorizing this service requires that some technical standards be adopted. Our goal in this proceeding is to strike a balance between adopting a technology that can foster lower production costs through the dissemination of proven technology and price competition; or, alternatively, postponing the standards decision to take into account the possibility of future innovation. We believe that the open-entry plan can best achieve this balance, since it would adopt a relatively new narrowband technology capable of using digital modulation, while at the same time leaving open the possibility of the licensees changing over to an even more advanced digital or cellular-compatible technology in the future.[50]

70. In this regard, we anticipate that all air-ground service providers will drive technology to the fullest. We note that under the Communications Act of 1934, the Commission has a mandate to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[51] Thus, we have taken several steps in this decision to encourage the air-to-ground licensees to utilize new technologies when they become available.[52] We intend to monitor the development of the air-ground service carefully to ensure that this mandate is met with respect to air-ground technology. We also point out that, should the need develop in the future, we could issue a notice of proposed rule making proposing to require that new advanced technologies be implemented in the air-ground service.[53]

71. We further find that, regardless of whether GTE Airfone is ultimately granted authorization to provide air-ground service, the requirement of co-locating ground stations within a mile of the existing, or initially established, base station is not unduly burdensome. The location of ground stations already is severely constrained by such practical considerations as commercial aircraft routes and the location of airports. Therefore, regardless of what technology is being employed, an air-ground licensee would not locate ground stations at substantially different locations than at present. Also, a requirement that a ground station be within one mile of the existing station still leaves a multitude of possible choices. Airports are generally surrounded by commercial buildings, such as hotels, so that in most cases there are many rooftop sites available. Thus, finding a location for a ground station antenna should not prove unduly burdensome. To the extent this requirement causes problems, waivers may be sought, pursuant to Section 22.19 of the Rules, if it can be demonstrated that there is a need and that no interference will be caused to other air-ground licensees.

72. An additional concern with the open-entry approach is that it arguably favors the operator of the experimental system, GTE Airfone. Like all licensees, however, GTE Airfone will have to apply for a license and demonstrate that grant will serve the public interest under the rules we adopt today. Because we are not proceeding by comparative hearings, GTE Airfone will not receive any comparative advantage over other applicants. Even if GTE Airfone were ultimately found not to be qualified, we believe it is appropriate to use its existing locations as a starting point in order to have a point of departure that minimizes potential interference. *See* paragraph 100, *infra*. Moreover, GTE Airfone would have to make modifications to its existing operation. In order for the open-entry plan to work, GTE Airfone would have to modify most of its existing equipment to be able to share the spectrum with other licensees and possibly even remove equipment from the aircraft of any airlines that change service providers. Any new licensees will not have this added burden. On balance, we believe the advantages to GTE Airfone are minimal and serve the public interest by providing a convenient starting point to minimize interference and delay.

73. In light of these considerations, we are adopting the open-entry sharing alternative proposed by Goeken. We find that this plan will permit the introduction of competitive air-ground telephone systems[54] in a rapid manner, even if GTE Airfone is ultimately not granted a license. We also find that the plan will promote spectrum efficiency, since it will permit new digital technologies to be superimposed on an already efficient narrowband analog air-ground telephone design. The basic technical environment for operation of air-ground systems is addressed below under *Technical Standards*.

Qualifying Criteria to be an Air - Ground Licensee

74. In the *Notice*, we proposed that applicants be required to meet three qualifying criteria: 1) financial qualifications, 2) technical qualifications, and 3) service availability.[55] Regarding financial qualifications, we stated in the *Notice* that applicants should be required to demonstrate that they have financial resources need to construct and operate the an air-ground system. We proposed to require that applicants provide full particulars regarding the cost of construction and operation of the proposed facilities, together with other initial expenses, and to demonstrate their financial ability to meet these expenses, including a balance sheet in support of the proposed facilities, income statement for the first year of operation, and details of any loans or other credit arrangements.[56] As for technical qualifications, we proposed to require that applicants provide a complete technical description of their systems, along with a discussion of its spectrum

efficient features, and technical information analyzing the system's potential for interference.[57] Finally, with respect to service availability, we proposed to consider each applicant's planned service availability including such factors as quality of service, geographic coverage area, and implementation schedule of the proposed service. In particular, we expressed a preference for applications seeking to make this service available on a nationwide basis, including, if feasible, Alaska, Hawaii, and U.S. possessions.[58]

75. Commenters generally support using these criteria.[59] McCaw contends that the FCC should adopt the full financial showing it has proposed. According to McCaw, an escrow deposit equal to the $5 million required of applicants in the mobile satellite service should be required for air-ground system applicants. Since a fully operational air-ground system might cost up to $200 million to design, construct, and operate for one year, McCaw asserts, $5 million is not unreasonable. Com/Nav also argues that financial requirements should be stringent. According to Com/Nav, a financial showing should include the existence of adequate internal resources and firm outside financial backing from institutional resources. Com/Nav states that applicants should be required to place ten percent of the estimated costs of construction, implementation, and three year operation into an escrow account. By contrast, Telocator contends that a line of credit is sufficient to ensure the ability to finance construction and operation of an air-ground system.

76. GTE supports the Commission's proposals on technical qualifications but recommends that we add as an additional qualification the requirement that an applicant have proven technical competence in two areas: 1) experience with systems of the type and complexity of an air-ground telephone system and 2) the technical proficiency to comply with applicable FAA regulations regarding installation, servicing, and maintenance of the radio and other equipment on board the aircraft. GTE says that applicants cannot assume that they will obtain the necessary FAA approvals by proposing to use standard commercially available equipment, but instead will have to develop their own equipment and obtain the required FAA approvals through lengthy proceedings.

77. GTE also supports the service availability criteria proposed by the Commission. Sky Cell states that a Commission requirement that each air-ground application specifically propose nationwide coverage within a reasonable time frame would be justified by the public interest in expedient provision of air-ground service.

78. Several commenting parties have proposed additional qualifying criteria. As a threshold entry condition, the Goeken plan would require a potential air-ground licensee to establish an agreement to provide air-ground service with at least one airline and to serve the entire country. However, according to Sky Cell, this aspect of the Goeken plan would unjustifiably turn over to the airlines the Commission's ability to determine applicant qualifications. Com/Nav asserts that minimum construction and operation milestones should be established for air-ground licensees. It proposes that the licensees be required to construct and make their basic systems operational within 24 months.[60] Com/Nav also proposes requiring that all sites proposed in the application be constructed and operational within three years. To discourage speculation, Com/Nav recommends that licensees not be permitted to transfer their authorizations until a year after construction of the nationwide systems. Global argues that if GTE Airfone is one of the licensees, the second provider must not be issued a construction permit requiring that its service be on line within a specified period of time. Global says that if this is required, either the system will not be as good as it could be, or the pressures of time will force the second provider to base its system on the technical standards of the Airfone system.

79. *Decision.* We find that the qualifying criteria proposed in the *Notice* are still generally appropriate under the open entry structure we are adopting herein.[61] Although we were anticipating using a comparative hearing to select air-ground licensees at the time of the *Notice*, we believe that these criteria are nonetheless reasonable under the structure that we are adopting. While we want to permit multiple service providers, we still must ensure that parties issued a license are able to implement the service.

80. Therefore, as proposed, applicants will have to submit information demonstrating that they have the financial capability to construct and operate an air-ground system. In accordance with our regulations for cellular service licensees set forth in Section 22.917(c) of our Rules, applicants will have to demonstrate that they have either a firm financial commitment or available internal financial resources necessary to construct and operate an air-ground system for one year.[62] We wish to emphasize that a substantial sum, in the range of several million dollars, would likely be the minimum necessary to construct and operate an air-ground system. Further, we shall require a complete technical description of the proposed system, including an explanation of how the system will interconnect with the landline telephone network and what the system capacity in terms of maximum number of calls per hour in the busiest areas will be.

81. As suggested by Sky Cell, in order to ensure that the public is adequately served, we will require that applicants provide nationwide service. We believe it is reasonable to require that licensees begin providing nationwide service within five years of receiving their initial authorization. Nationwide service means that the applicant's system operates coast-to-coast with at least 50 ground stations.[63] We believe that a system that meets these criteria is the minimum necessary to provide a truly nationwide rather than regional service. We have chosen five years, rather than the three year period suggested by Com/Nav because we agree with Global that it is not desirable to push licensees into constructing inefficient systems. However, we will require that at least 25 sites be constructed within three years of the issuance of the authorization[64] before we will permit the system to become operational through the filing of an FCC Form 489, *Notification of status of facilities*, for each site. Failure to construct 25 sites within three years or failure to provide nationwide service through 50 sites within five years would lead to automatic forfeiture of the authorization. This will ensure that only systems of serious entrants will need to be accommodated by the other operators.[65]

82. We are further requiring air-ground applicants to establish a written agreement to provide service with at least one airline or airline organization.[66] These agreements must be entered into prior to the time the application is filed with the Commission and must be submitted with the application. This requirement is intended to further our objective of discouraging speculative appli-

cants that do not actually plan to build a system themselves or that are unable to build one. We believe that any applicant that is serious about constructing an air-ground system will have at least one client with a significant number of aircraft under contract prior to filing its application. We reject Sky Cell's contention that a service agreement would turn over to the airlines the Commission's ability to determine applicant qualifications. We find that such an agreement is reasonable because of the large number of airlines and airline organizations that an air-ground applicant will have available with which to negotiate. We also do not believe such a requirement overly favors GTE Airfone. We believe that serious applicants for the service other than GTE Airfone will be able to obtain such commitments. Indeed, the suggestion for this requirement was made by someone other than GTE Airfone.

83. Finally, we agree with Com/Nav that transfers of control of applications, authorizations, or licenses should not be permitted until a year after the operation of the nationwide system has commenced. This one year time period will begin to run from the date the licensee notifies the Commission that it has completed construction of its fiftieth base station and has provided service to the public from all 50 base stations. Therefore, amendments to 800 MHz air-ground applications proposing to transfer control or assignment of an application are not permitted and will be dismissed. Likewise, transfer of control or assignment of a license filed after the grant of an authorization in the 800 MHz air-ground service will be dismissed if it seeks to transfer control of the authorization prior to the expiration of the one year period. Again, we are adopting these requirements, which should not be overly burdensome for a serious applicant, in order to deter the filing of speculative applications.

84. We are not imposing any requirements regarding quality of service. We believe that such provisions are unnecessary in a competitive environment such as the one we are establishing for the air-ground service. The specific information that we are requiring is reflected in the rules attached hereto and is separately listed in a companion Public Notice that solicits applications to operate in the service. Applicants will have until October 15, 1990 to submit their air-ground applications. [67] After the filing window no new applications may be filed unless the Commission by public notice solicits new applications.

Blanket Licensing and License Term

85. Com/Nav states that the Commission should blanket license the entire air-ground system, so that individual users of transceivers need not have to apply for licenses. Com/Nav suggests a term of ten years for the blanket authorization.

86. *Decision*. We believe that Com/Nav's proposal is logical. It would be very cumbersome to require that users of the air-ground service be licensed. Furthermore, licensing each system for a period of several years would eliminate the need for routine paperwork on an annual basis. Therefore, we shall adopt Com/Nav's proposal and blanket license each air-ground system users for a period of ten years.

Provision of Ancillary Services by Air - Ground Licensees

87. *Comments*. In the *Notice*, we stated that "there may be frequencies that cannot be used for air-to-ground service in certain geographic areas because, for example, separation criteria for frequency reuse cannot be satisfied. It is conceivable, however, that this spectrum could be put to other uses locally."[68] Several parties support authorizing the provision of ancillary services in a four megahertz air-ground allocation, with only BellSouth opposing this concept. Although the *Notice* suggested the possibility of allocating this spectrum for a general mobile service, no party favors such an allocation. Motorola, however, suggests the possibility of sharing a two megahertz air-ground allocation with private low-power systems.

88. Parties favoring the authorization of ancillary services generally state that ancillary services should be allowed on frequencies not being used for air-ground service in particular areas. These parties state that adoption of the ancillary services proposal would maximize spectrum efficiency, because all frequencies would not be used for air-ground service in all areas. Global supports the allowance of ancillary services, provided that the integrity of the air-ground service is not compromised and that the air-ground frequencies may be used by the air-ground licensee only. GTE maintains that ancillary services should be allowed upon a demonstration by the air-ground licensee of excess capacity. Goeken asserts that its sharing plan would permit substantial sharing with other services, such as land mobile radio, and that even in urban areas such as New York, Los Angeles, and Chicago, approximately half of the spectrum allocated for the air-ground service would be available for sharing.

89. Motorola contends that an air-ground service, even when operating at optimal subscriber levels, is by its nature an inefficient use of the spectrum, rendering spectrum unusable across hundreds of square miles because of the wide footprint cast by an aircraft. Motorola therefore proposes that instead of permitting the air-ground licensee(s) to offer ancillary services, the Commission should authorize co-primary, low-power use by private land mobile radio eligibles on a shared basis with the air-ground service. Motorola states that with its proposed shared use plan, there would be an opportunity to recover at least some degree of efficient re-use of the spectrum. Motorola emphasizes that for the private radio eligibles, low-power operation would not be an adjunct to air-ground revenues, but the sole operation. According to Motorola, these private system eligibles would have every economic incentive to maximize the implementation of low-power systems, thereby stimulating greater use of the spectrum. In order to permit such sharing, asserts Motorola, the Commission should place any air-ground applications on public notice so that low-power providers can study the technical parameters for purposes of developing sharing and coordination requirements.

90. BellSouth opposes the offering of ancillary services by air-ground licensees, stating that such an offering would be premature. BellSouth argues that air-ground radiotelecommunications should first be established as a viable service. McCaw submits that given the large expected demand, sharing of spectrum with other licensees (such as proposed by Motorola) is not in the public interest. It contends that coordination would be extremely difficult because of different reuse patterns and that a

general allocation of the spectrum to mobile telephone services likely would inhibit the provision and development of air-ground service.

91. *Decision*. We believe that permitting ancillary services on a secondary basis to the primary air-ground service may be in the public interest. As noted by Motorola and others, an air-ground service cannot fully utilize its entire allocation in all geographic areas; therefore, spectrum efficiency can be increased by allowing either the air-ground licensees or others to provide ancillary services so long as the operations in those services do not interfere with the air-ground service. Further, we also want to encourage the air-ground licensees to utilize the spectrum most efficiently and to introduce new technologies. Therefore, to the extent the air-ground licensees may be able to use new technologies to provide the air-ground service in less than the allocated four megahertz, it might be appropriate to permit them to utilize any spectrum that becomes available as a result of the use of new technologies to provide other services for which the air-ground licensees believe a demand exists. In effect, this would provide the air-ground licensees with the type of flexibility that we recently accorded the cellular licensees.[69] We note, however, that as was the case with cellular flexibility, air-ground licensees would not be permitted to provide ancillary services at the expense of basic air-ground service.

92. However, because the provision of ancillary services will require extensive coordination among the air-ground licensees as well as with the providers of those services, if they are not the air-ground licensees, we believe that further public notice and comment regarding how ancillary services may be provided is warranted. Accordingly, we will not authorize provision of ancillary services at this time. Instead, we will commence a rule making to consider how the provision of ancillary services may be implemented in the air-ground service.

Technical Standards

93. In the *Notice*, we indicated that our primary technical objective was to establish standards for the air-to-ground service that would ensure that the service operates with maximum spectrum efficiency and on a non-interference basis with adjacent services. As a variety of technical designs might be compatible with our goals, no detailed technical standards were proposed.[70] Several commenters concur that maximum technical flexibility should be given to the air-ground licensees.

94. Goeken asserts that technical flexibility can be given to licensees in the context of its sharing plan. It states that the basic ground station plan and technical structure of GTE Airfone's experimental system should be followed, but that Airfone's pilot channels should be subdivided into four pilot channels to facilitate sharing. Goeken further proposes that licensees be free to use any modulation method provided that out-of-band emissions are strictly limited.

95. Global and McCaw state that in-band technical standards are not necessary and that in-band technical designs are better left to the licensees. They submit that the Commission should require air-ground licensees to coordinate their system designs and operations. Global also maintains that air-ground licensees should be required to publish their technical standards to facilitate flexible equipment design. Global states that such publication would not be unprecedented. For instance, Global states that it has published the technical specifications for its Air-Ground Radiotelephone Automated Service System in deference to the Commission's concern that terminal equipment for the automated signaling system be compatible with manual equipment. Without technical information, Global states, equipment manufacturers will be unable to manufacture air-ground equipment that can be used with more than one system; *i.e* equipment which employs a switch to allow the airborne user to make a real time choice as to which system to use. Global says that it is not requesting that an airline be required to make more than one system available, but only that it should have that option.

96. Several parties state that precautions must be taken to ensure that out-of-band emissions do not cause interference between the air-ground service and the adjacent cellular and private land mobile services because of the wide-area nature of the air-ground service. In order to protect the adjacent cellular radio service, Bell Atlantic, CTIA, and McCaw contend that the allocation for air-ground service should include a guardband or be moved to another band, such as 901-902/940-941 MHz. CTIA proposes that the 849-849.1/894-894.1 MHz bands be used as a guardband between the cellular allocation at 824-849/869-894 MHz, and the air-ground allocation at 849-851/894-896 MHz. McCaw contends that adjacent frequency protection can be provided by establishing a 30 kHz guardband at the band edges.

97. Com/Nav states that CTIA's guardband proposal has merit, but that its proposed bandwidth is excessive. Com/Nav says that there is already a guardband of 15 kHz, since the center of the 30 kHz cellular channels adjacent to the air-ground band are 30 kHz removed from the start of the air-ground allocation. Com/Nav argues that properly designed receivers should be able to provide the necessary rejection of adjacent channel signals--particularly when the adjacent undesired signal is not stronger than the desired signal. However, Com/Nav cautions, good engineering practices must be used by both air-ground and cellular licensees to prevent adjacent channel interference to either service.

98. CTIA also requests that the Commission adopt emission standards for the air-ground telephone service that are more power restrictive with respect to out-of-band emissions than those set forth for cellular operators in Section 22.907 of the Rules. According to CTIA, these provisions are necessary because the Commission's proposal would place the higher power ground stations on the channels adjacent to the cellular mobile band, thus increasing the likelihood of interference at the cellular base station receivers. Further, CTIA argues, in view of the extensive range of the airborne stations, interference at cellular mobile receivers over a wide range is likely. It therefore proposes that the rules include a requirement that licensees in the air-ground service must coordinate their proposed frequency usage with terrestrial cellular carriers in the adjacent frequency bands within 75 miles of the proposed air-ground facility.

99. *Decision*. At the time the *Notice* was issued, we were anticipating using comparative hearings to select licensees and found it inappropriate to propose detailed technical standards. Under the sharing plan being adopted herein, however, a different approach is necessary. While we still wish to give air-ground licensees as much technical freedom as possible, we now must specify technical standards to make the sharing plan workable. As proposed in the

Notice, the 849-851 MHz band will be used for communications from ground stations to airborne stations, and the 894-896 MHz band will be used for communications from airborne stations to ground stations. However, rather than permitting the licensees to specify a channeling plan, we will initially implement the Goeken channeling plan and require that each band be divided into ten channel blocks of 200 kHz each. Further, we will require that each channel block be subdivided into four 3.2 kHz pilot channels,[71] thirty-one 6 kHz communications channels, and a 1.2 kHz guardband.[72] Each licensee will be permitted to specify its own modulation method provided, however, that the attenuation requirements specified in Section 22.1111 of the Rules are met. A more complete technical description of all system requirements is specified in Part 22, Subpart M of the Rules. These standards are based on current technology and are subject to change with the availability of new technology compatible with this spectrum (*e.g.* Time Division or Code Division Multiple Access). It will be the responsibility of the parties, working with the Commission, to coordinate upgrades in a timely manner.

100. We will further require that air-ground licensees locate their ground stations within one mile of the first ground station licensed for that site to limit adjacent channel interference resulting from Doppler frequency shifts. We note that the GTE Airfone system appears to be operating on a workable site location plan. In order to avoid confusion and disputes over site locations that could disrupt or delay the initiation of licensed service, we believe it is desirable to preserve the GTE Airfone plan as the starting site location plan for the licensed service, even if GTE Airfone is not ultimately granted a license. *See* supra. We will permit a new co-channel site to be added when the proposed ground station channel is to be located at least 550 miles away from all existing sites using the same channel block.[73]

101. We are not requiring that licensees publish their technical standards. As such information can be proprietary, a licensee may wish to make that information available only to a limited number of manufacturers. Moreover, we do not find any public interest benefit that necessitates requiring that standards be published, since it is not clear that airborne equipment capable of accessing more than one air-ground system would be developed even if publication of technical standards were required. The cost and weight of such equipment, plus a lack of demand for it, could prevent it from becoming economically viable. Alternatively, if cost, weight, and demand factors are favorable, such equipment likely will be developed even absent a requirement that technical standards be published. Therefore, we will allow the licensees to make their own decisions regarding publication of technical standards.

102. In addition, we are not convinced that either coordination or a guardband is necessary between air-ground licensees and adjacent cellular and private land mobile radio services. The frequency separations provided by virtue of the fact that neither the cellular nor private land mobile services operate exactly at the band edges adjacent to the air-ground allocation render coordination and a guardband unnecessary, if careful planning is done by the air-ground licensees.

Ownership and Control of Aircraft Equipment

103. Global states that the decision as to who should own air-ground equipment aboard the aircraft is best left to the airlines and licensees. However, Global contends it is imperative as a matter of safety that the aircraft operator have ultimate control over the operation of system equipment aboard the aircraft. Therefore, it asserts that the Commission should require that the system be accessible from the cockpit in order to make it more useful as a backup for the pilot and/or crew, with cockpit communication having priority in most instances.

104. *Decision*. We concur with Global that ownership of airborne equipment should be decided by the air-ground licensees and airline companies, rather than by the Commission. We believe that the licensees and the airlines can best make this decision. Moreover, we do not believe there is any public interest reason for the Commission to become involved in the ownership of air-ground telephone equipment. Similarly, we see no need for mandating that the pilot and/or crew should have priority access to the air-ground channels. Since there already are emergency communications frequencies accessible by the pilot and crew, some airlines may deem additional communications capability unnecessary. Others, however, may believe that the newly available channels will provide a useful back-up. Air-ground licensees and the airlines will be able to establish satisfactory arrangements in this regard on an individualized basis without Commission involvement. Therefore, we decline to adopt Global's proposal.

Period for Filing Applications

105. We are today releasing a Public Notice soliciting applications to operate in the 800 MHz Air-Ground Radiotelephone Service. Applicants will have until October 15, 1990 to submit their applications. Each applicant, if qualified, will receive authority to commence construction of an air-ground system in a manner consistent with the plan set forth above. Those who construct 25 sites in a timely manner may then commence operation upon filing an FCC Form 489. After all systems have been constructed, licensees will be permitted to implement a new technology, if they are able to reach agreement among themselves. We anticipate that this will be the only filing window to operate in this service. However, we reserve the right to open an additional filing window at some future time if we find it in the public interest to do so; *e.g.* if a monopoly should develop in the service, we might well find it appropriate to re-open the filing window.

FINAL REGULATORY FLEXIBILITY ANALYSIS

106. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in General Docket No. 88-96. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

107. *Need for and Objective of Rules*. Our objective has been to satisfy demand for a public air-ground radiotelephone service. We have established a regulatory framework that provides for competing air-ground systems to ensure that this demand is satisfied at the lowest cost and highest benefit to the consumer.

108. *Issues Raised by the Public in Response to the Initial Analysis*. Several parties suggested modifications to the proposals set forth in the *Notice*. As a result, we have modified our proposals as appropriate. For example, we are now adopting an open-entry policy with qualifying financial, technical, and service availability criteria rather than selecting the licensees ourselves.

109. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives*. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives adequate service in a prompt manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

110. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. This requirement is subject to approval by the Office of Management and Budget (OMB). At the time the *Notice* was issued, OMB requested that the Commission address the following areas of concern: 1) how the confidentiality of financial qualifications could be assured/treated; 2) what, if any, of the information might be required on more than a one-time applications basis; and 3) whether some of the information proposed in this rule making might be used to evaluate license renewals.

111. In response, we note that confidentiality of financial information will be assured to the extent the information is not essential to our public interest determinations and is otherwise permitted by law to be confidential. Financial information that is responsive to the financial showing requirement established herein will have to be made publicly available in order that interested parties may comment upon the adequacy of the demonstration. Any other financial information that comes into our possession and for which confidential treatment is requested under our rules will be available only to Commissioners and selected Commission staff and will not be placed in a public file except as required by law and the provisions of our rules. As detailed in the companion Public Notice to this *Report and Order* soliciting applications to construct and operate an air-ground telephone service, substantial financial, technical, and service information will be required only for the initial applications. We anticipate that a lesser amount of data will be required to evaluate license renewals. Some of the initial information obtained may be used to evaluate license renewals, if feasible. However, to the extent the nature of the service changes, the initial information may be outdated at the time of license renewal; *e.g.* if the technical structure of the service changes substantially, the initial technical information may be irrelevant at the time of renewal. At this time the precise information we will require to process renewal applications is unclear. We intend to address this issue in a future rule making proceeding.

ORDERING CLAUSES

112. Authority for this Rule Making is contained in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

113. Accordingly, IT IS ORDERED, that Parts 2 and 22 of the Commission's Rules and Regulations ARE AMENDED as specified below, effective September 4, 1990. IT IS FURTHER ORDERED, that American Sky Cell Corporation's Request for Further Notice and Comment in General Docket No. 88-96, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX A

Parts 2 and 22 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by revising columns 5 and 6 in the table for the 849-851 AND 894-896 MHz bands as follows:

Section 2.106 Table of Frequency Allocations.

United States Table

Non-Government Allocation (MHz) (5)	Rule Part(s) (6)
* * *	* * *
849-851 AERONAUTICAL MOBILE	PUBLIC MOBILE (22)
NG30 NG63 NG153	
* * *	* * *
894-896 AERONAUTICAL MOBILE	PUBLIC MOBILE (22)
US116 US268 NG153	
* *	* * *

B. PART 22 - PUBLIC MOBILE SERVICE

1. The authority citation in Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.9 is amended by revising the title and paragraph (c)(2) to read as follows:

Section 22.9 Standard application forms and permissive changes or minor modifications for the public mobile service.

* * * * *

(c) * * *

(2) AIRBORNE MOBILE STATIONS. Applications for a license for airborne mobile stations in the 459.675-459.975 MHz band, submitted by persons who propose to become subscribers to a common carrier service for public correspondence shall be filed on FCC Form 409. This form will also be used for the modification and renewal of such licenses. Such applications shall also be accompanied by the supplemental showing set forth in Section 22.15(i)(2).

* * * * *

3. Section 22.15 is amended by adding paragraphs (a)(1)(i) and (n) to read as follows:

Section 22.15 Technical content of applications.

(a) * * *

(1) * * *

(i) Applicants in the 800 MHz Air-Ground Radiotelephone Service shall list the city and state of the proposed ground stations.

* * * * *

(n) In the 800 MHz Air-Ground Radiotelephone Service each application shall contain the information required in Subpart M.

4. Section 22.16 is amended by revising paragraph (d) to read as follows:

Section 22.16 Objective need standards.

* * * * *

(d) Applications which do not satisfy these standards will be dismissed and returned as unacceptable for filing pursuant to Section 22.20. However, the requirements of Section 22.16 do not apply to applications in the 800 MHz Air-Ground Radiotelephone Service.

5. Section 22.23 is amended by adding new paragraph (h) to read as follows:

Section 22.23 Amendment of applications.

* * * * *

(h) *800 MHz Air-Ground Radiotelephone Service.* In this service major and minor amendments may be filed after the filing of the initial application.

(1) The filing of a major amendment will not render the application to be treated as newly filed.

(2) The proposed addition of base stations will be considered a minor amendment as long as the initial application proposed 50 ground stations.

(3) Amendments proposing to transfer control or assignment of an application or a substantial change in beneficial ownership or control of the applicant are not permitted and will be dismissed.

6. Section 22.29 is amended by adding new paragraph (c) to read as follows:

Section 22.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

* * * * *

(c) The provisions of Section 22.29 do not apply to the 800 MHz Air-Ground Radiotelephone Service.

7. Section 22.31 is amended by adding new paragraph (h) to read as follows:

Section 22.31 Mutually exclusive applications.

* * * * *

(h) Notwithstanding other provisions in this section, applications for the 800 MHz Air-Ground Radiotelephone Service will not be considered mutually exclusive.

8. Section 22.35 is amended by adding new paragraph (c) to read as follows:

Section 22.35 Comparative evaluation of mutually exclusive applications.

* * * * *

(c) The provisions of Section 22.35 do not apply to applications in the 800 MHz Air-Ground Radiotelephone Service.

9. Section 22.40 is amended by adding new paragraph (c) to read as follows:

Section 22.40 Considerations involving transfer or assignment applications.

* * * * *

(c) *800 MHz Air - Ground Radiotelephone Service.* Applications and authorizations for unconstructed facilities in this service cannot be transferred or assigned or be the subject of any substantial changes in ownership.

(1) Authorizations for constructed facilities may be transferred or assigned or subject to substantial changes in ownership only after the station has been operated for one year. Transfer of control or assignment applications filed prior to the expiration of this one year period will be dismissed.

10. Section 22.43 is amended by adding new paragraph (e) to read as follows:

Section 22.43 Period of construction.

* * * * *

(e) *800 MHz Air - Ground Radiotelephone Service.* Subject to the provisions of Section 22.43 (d) applicants may preconstruct air-ground stations.

(1) Within three years after the grant of the initial authorization, the licensee must construct at least 25 ground stations.

(i) Upon completion of construction of at least 25 ground stations, the licensee must notify the Commission of completion of construction using FCC Form 489. Licensees may commence service on the day Form 489 is mailed to the Commission.

(2) Within five years after the grant of the initial authorization, the licensee must complete construction of 50 ground stations and begin providing nationwide service to the public.

(3) Failure to comply with any of the requirements of Sections (e)(1), (e)(1)(i) or (e)(2) will cause the authorization to automatically expire and the authorization must be submitted to the Commission for cancellation.

11. Section 22.44 is amended by revising paragraph (c) to read as follows:

Section 22.44 Termination of authorization.

* * * * *

(c) *State Certification.* Except in the 800 MHz Air-Ground Radiotelephone Service, where the holder of an authorization is denied state certification and the state appeal process is exhausted before the end of the one year period, the license will be forfeited. If the licensee regains state certification before the end of the one year period, a request for reinstatement may be considered.

12. Section 22.45 is amended by adding new paragraph (c) to read as follows:

Section 22.45 License period.

* * * * *

(c) 800 MHz Air-Ground Radiotelephone Service. The license will terminate 10 years from the date a system with 25 ground stations initially becomes operational upon the filing of FCC Form 489.

13. Section 22.110 is amended by adding new paragraph (f) to read as follows:

Section 22.110 Antenna polarization.

* * * * *

(f) The provisions of Section 22.110 do not apply to stations in the 800 MHz Air-Ground Radiotelephone Service.

14. Section 22.115 is amended by adding new paragraph (d) to read as follows:

Section 22.115 Topographic data.

* * * * *

(d) The provisions of section 22.115 do not apply to stations in the 800 MHz Air-Ground Radiotelephone Service.

15. Section 22.117 is amended by adding new paragraph (c) to read as follows:

Section 22.117 Transmitters.

* * * * *

(c) 800 MHz Air-Ground Radiotelephone Service. Air-ground licensees may construct and operate additional ground stations less than one mile from the stations listed in Section 22.1109 or any station authorized at a later date in accordance with the requirements of subsection (b) of this section. In addition, these licensees must comply with the following requirements:

(1) Obtain marking and lighting specifications from the Commission's Antenna Survey Branch before commencing construction.

(2) Serve a copy of FCC Form 489 on other authorized air-ground carriers at the time the licensee files Form 489 with the Commission.

* * * * *

16. Section 22.213 is amended by adding new paragraph (e) to read as follows:

Section 22.213 Station identification.

* * * * *

(e) Stations in the 800 MHz Air-Ground Radiotelephone Service shall not be required to identify the station.

17. Part 22 is amended by adding a new Subpart M to read as follows:

SUBPART M - 800 MHz Air - Ground Radiotelephone Service Section 22.1100 Scope.

The rules in this Subpart govern the licensing and operation of air-ground radiotelephone systems that use the 800 MHz air-ground spectrum. The licensing and operation of these systems is also subject to rules elsewhere in this Part that apply generally to the public mobile services. However, in case of conflict, the rules in this Subpart will govern.

Section 22.1101 Eligibility.

Authorizations for air-ground systems to be operated in the 800 MHz Air-Ground Radiotelephone Service will be issued to existing and proposed communication common carriers. Applications will be granted only if it is shown that the applicant is legally, financially, technically and otherwise qualified to render the proposed service and the public interest, convenience and necessity would be served by a grant thereof.

Section 22.1102 Application requirements.

Applications for authorizations in the 800 MHz Air-Ground Radiotelephone Service must be filed using FCC Form 401 and be accompanied by the same application filing fee as is required for new public land mobile systems. In addition to the application filing requirements contained in Sections 22.13 and 22.15 of this Part, the following exhibits must be attached to such applications:

(a) *Written Agreement.* A signed agreement between the applicant and at least one airline or airline organization, authorizing the applicant to provide air-ground service on its aircraft.

(b) *Financial Qualifications.* At the time of filing its application, an applicant must demonstrate that it has either a firm financial commitment or available internal financial resources necessary to construct all proposed ground stations and operate them for one year after initiation of nationwide air-ground service.

(1) The demonstration of commitment must include, and be sufficient to cover, the realistic and prudent estimated costs of construction of the 50 required ground stations, as well as any additional ground stations proposed by the applicant, and the cost of their operation, and any other initial expenses for one year after initiation of nationwide air-ground service. The estimated construction costs, operation costs, and other initial expenses must be itemized.

(2) The firm financial commitment required above shall be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier, and shall contain a statement that the lender:

(i) has examined the financial condition of the applicant, including audited financial statements, and has determined that the applicant is creditworthy;

(ii) that the lender is committed to providing a sum certain to the particular applicant;

(iii) that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and

(iv) that the commitment is not in any way guaranteed by any entity other than the applicant.

(3) Applicants intending to rely on personal or internal resources must submit:

(i) audited financial statements, certified within one year of the date of the application, indicating the availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year.

(A) The auditors must be certified public accountants.

(B) Net liquid assets is considered to be the excess of current assets (readily converted to cash) over current liabilities. In order to demonstrate ready convertibility into cash, the identity, liquidity, and value of listed assets must be demonstrated. Non-liquid assets can be relied on if the marketability of those assets is documented.

(ii) an audited balance sheet current within 60 days of filing, which clearly shows the continued availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year after nationwide service begins.

(c) *Service Plan.* A service plan containing:

(1) a map or other description of the planned geographic coverage area, including air space over the continental United States, Alaska, Hawaii, and other United States territories.

(2) a schedule for construction of 25 ground stations within three years and of at least 50 ground stations and the commencement of nationwide service to the public within five years from the grant of the initial authorization.

(3) a projection of the system capacity, expressed in terms of the maximum number of calls per hour in each area.

(d) *Technical Exhibit.* A technical description of the proposed system, demonstrating compliance with all applicable technical requirements and describing how the proposed system would operate, if authorized. This exhibit must provide the following information:

(1) the number of ground stations to be used, their locations, and the type and quantity of equipment proposed for the system;

(2) a complete description of the procedures and data protocols to be used on the control channel;

(3) the modulation types to be used and their spectral characteristics;

(4) the effective radiated power and transmitter peak envelope power for all transmitters at each ground station location, and the effective radiated power of the airborne mobile stations;

(5) antenna information as follows:

(i) for airborne mobile stations, the antenna type(s) to be used;

(ii) for ground stations, vertical and horizontal radiation patterns, antenna heights above ground level, antenna support structure heights above ground level, ground elevation above mean sea level, and any relevant information (*e.g.* FAA approval) that may be helpful in determining whether ground station antennas require marking and lighting;

(6) analytical data, including calculations, of potential interference within and without the spectrum proposed to be used for the air-ground system;

(7) an Environmental Assessment, if required. *See* Section 1.1301 *et seq.*

Section 22.1105 Frequency ranges.

The 849-851 and 894-896 MHz frequency ranges have been allocated to this service. Ground stations transmit on frequencies in the 849-851 MHz range. Airborne mobile stations transmit on frequencies in the 894-896 MHz range.

Section 22.1107 Initial channel plan.

Initially, all air-ground licensees are required to use the channel plan described in this Section. However, after air-ground service has been established, if all licensees agree that an alternative channel plan would be more efficient or beneficial, such alternative plan may be used. A complete description of the alternative plan must be provided the Commission one month before licensees begin using it.

(a) *Channel blocks*. The spectrum allocated for this service is divided into ten channel blocks, numbered 1 through 10. All ground stations in each geographical area use the same channel block for communication with airborne stations in flight, in accordance with Section 22.1109.

(1) Unless the Commission assigns control channels to more than four competing air-ground systems, each channel block is subdivided into four control channels, labeled P-1 through P-4, a guardband, labeled GB, and thirty-one communication channels, labeled C-1 through C-31. When the Commission assigns control channels to five or more systems, the guardband and one or more communications channels, beginning with channel C-1, will be converted to control channels.

(2) The channel bandwidths are as follows:

(i) Each control channel has a bandwidth of 3.2 kHz.

(ii) Each guardband is 1.2 kHz wide.

(iii) Each communication channel has a bandwidth of 6 kHz.

(b) *Frequency pairs*. The control channels, guardbands, and communication channels correspond to frequency pairs as follows:

FOOTNOTES

[1] In 1986, GTE, Inc. acquired Airfone, Inc. and now operates the experimental service. Today that service is available on over a thousand commercial aircraft.

[2] *See Notice of Proposed Rule Making*, GEN Docket No. 88-96, 3 FCC Rcd 2436 (1988).

[3] The *Notice* followed a *Report and Order* in GEN Docket Nos. 84-1231, 84-1233, and 84-1234 that allocated 28 megahertz of the reserve spectrum to various services, but left the 849-851/894-896 MHz bands temporarily unallocated. Specifically, this decision allocated ten megahertz of additional spectrum for cellular systems, ten megahertz for private land mobile radio use other than public safety, six megahertz for public safety use, and two megahertz for a general purpose mobile radio service. Additionally, twenty-seven megahertz of L-band spectrum were allocated for a mobile satellite service. *See Report and Order*, GEN Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986), *recon. denied*, *Memorandum Opinion and Order*, 2 FCC Rcd 6830 (1987).

[4] Comments were due on July 1, 1988, and reply comments were due on August 16, 1988. In an *Order* issued on August 16, 1989, the Commission accepted the late-filed comments of the Goeken Group Corporation (Goeken). The *Order* also allowed reply comments to the Goeken comments to be filed until October 10, 1989. *See Order Accepting Late - Filed Comments*, 4 FCC Rcd 6614 (Off. Eng. & Tech. 1989).

[5] Parties supporting the service include GTE Corporation/GTE Airfone Incorporated (GTE), fourteen airline companies, two airline associations, seven prospective air-ground licensees, four cellular radio companies and associations, a medical association, and a company that provides aeronautical satellite communications. Parties opposing the allocation include a land mobile radio manufacturer, four land mobile associations, and a local government organization. Parties that are neutral include a manufacturer of fixed telephone equipment, two local government associations, three local telephone associations, two telephone companies, and an entrepreneurial organization.

[6] Air Transport Association of America (ATA) figures show that just over 450 million revenue passengers were enplaned in 1988. *See The World Almanac and Book of Facts*, 1990 edition, p. 151. Alternatively, McCaw Cellular Communications, Inc., at p. 6 of its comments, cites Federal Aviation Administration (FAA) statistics for an unnamed year that show 4,971,500 flights were flown with an average load of 120 passengers. Multiplying these figures produces approximately 600 million passengers. The discrepancy between the ATA and FAA figures appears to arise because the ATA counts a passenger aboard a flight having more than one segment only once, whereas the FAA counts the passenger for each segment flown; *e.g.* a passenger aboard a flight between Boston and Seattle, having an intermediate stop in Chicago, would be counted only once by the ATA but twice by the FAA.

[7] Seatfone is a GTE product that is mounted on the back of passenger seats to permit use of Airfone's service without leaving the seat location.

[8] Com/Nav, a subsidiary of Mobile Communications Corporation of America (MCCA), filed comments and reply comments in this proceeding. Reply comments to Goeken's late-filed comments were filed by MCCA's successor corporation, Mobile Telecommunications Technologies Corporation (Mtel).

[9] Com/Nav states that these principles were initially developed in 1936 in Docket 8929 and in 1944 in Docket 6651, and were further enunciated in FCC, *Draft Report of Proposed Allocation from 25,000 Kilocycles to 30,000 Kilocycles*, at 18-20, January 15, 1945, republished in *Order of Inquiry in Docket 11997*, 22 FR 2684, 2685, Appendix A (1957).

[10] Thirteen frequency pairs at 454.675-454.975/459.675-459.975 MHz are allocated for the provision of radiotelephone service between airborne stations and interconnected land mobile radio systems. The first frequency pair is used for signaling and is associated with the other twelve frequency pairs that are used for air-ground communications. *See* Section 22.521 of the Rules, 47 CFR Section 22.521.

[11] The *Notice of Proposed Rule Making* in GEN Docket No. 83-30, 48 FR 12,253 (March 23, 1983), proposed that the 896-898/941-943 MHz bands be allocated for air-ground service. However, in the *Report and Order* in that proceeding, 57 RR 2d 1219 (1985), the Commission denied the allocation because of the 800/900 MHz spectrum needs of the cellular, private land mobile radio, and mobile satellite services. Subsequently, as discussed in footnote three *supra*, the 800/900 MHz allocation plan was modified in GEN Docket Nos. 84-1231, 84-1233, and 84-1234, leaving the 849-851/894-896 MHz bands unallocated.

[12] Additionally, on February 21, 1990, Federal Digital Cellular, Inc. (Federal Digital) submitted a filing proposing that these bands be allocated for a third cellular system employing digital technology. GTE submitted an opposition to Federal Digital's filing on March 7, 1990, Associated Public-Safety Communications Officers, Inc. (APCO) submitted a response to Federal Digital's comments on March 8, 1990, National Association of Cellular Agents and National Cellular Resellers Association submitted filings generally supporting Federal Digital's filing on March 23, 1990 and March 25, 1990, respectively, and Federal Digital submitted a reply to GTE's opposition on March 30, 1990. Since these filings were submitted well after the comment deadlines in this proceeding, we will treat them as written *ex parte* presentations under Section 1.1206(a)(1) of the Commission's Rules. 47 CFR Section 1.1206(a)(1).

[13] *Further Sharing of the UHF Television Band by Private Land Mobile Services*, 50 FR 25,587 (June 20, 1985).

[14] *See Public Notice*, Mimeo No. 198 (released October 15, 1987).

[15] Tri-State Radio's proposals were contained in a filing of January 22, 1990. APCO, Southern California Regional Plan Revision Committee, and The North Central and North East Texas Regional Review Committee submitted filings in support of Tri-State Radio's filing on February 13, 1990, March 6, 1990, and March 15, 1990, respectively. GTE filed an opposition to Tri-State Radio's and APCO's filings on February 21, 1990. As discussed in footnote 12, *supra*, we will treat such filings as written *ex parte* presentations under Section 1.1206(a)(1) of the Commission's rules. 47 CFR Section 1.1206(a)(1).

[16] The Commission has dismissed the application for authorization of the AvSat system. *See Order*, File No. CSS-87-015(7), 2 FCC Rcd 5990 (1987), *recon. denied*, 4 FCC Rcd 6067 (1989); *see also Memorandum Opinion and Order*, GEN Docket No. 84-1234, 4 FCC Rcd 6041 (1989).

[17] *See Report and Order*, CC Docket No. 86-495, 3 FCC Rcd 214 (1988).

[18] While our proposal primarily discussed the needs of commercial users for air-ground communications, we never intended to limit the use of the service solely to commercial aircraft. To the extent non-commercial aircraft wish to use this service, they may do so.

[19] *See generally Cellular Communications Systems (Cellular Systems)*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983).

[20] The International Maritime Satellite Organization (INMARSAT) recently initiated an experimental international aeronautical passenger communications service via its maritime satellite communications system. INMARSAT plans to implement such service as well as aeronautical en-route communications on a permanent basis in its next generation of satellites using the 1545-1548/1646.5-1649.5 MHz bands. According to the Goeken Group Corporation comments filed in this proceeding, the charge for using the experimental INMARSAT service on British Airways is $30 per three minute international call, compared with Airfone's charge for a domestic call of $7.50 for the first three minutes and $1.25 per minute thereafter. *See* Goeken Group comments at p. 12. However, Airfone now offers international calling at a rate of $4.00 per minute plus a $4.00 setup fee per call. *See Communications Daily*, January 4, 1990, at p. 5. Thus, a three minute international call on Airfone's system would cost $16.00, or about half of the charge on the experimental INMARSAT system. We recognize, however, that charges for satellite-based systems may be reduced in the future due to economies of scale.

[21] Since the satellites usable for air-ground communication are in geostationary orbit approximately 22,300 miles above the earth, the time delay involved in a two way conversation is about one half second; i.e., the communication must travel to and from the satellite twice, for a total distance of 4 x 22,300 miles = 89,200 miles. The speed of light is about 186,000 miles per second; therefore it takes 0.48 seconds for communication signals to travel 89,200 miles. So-called "echo cancellers" can ameliorate this problem, although the equipment involved is both relatively costly and does not always work well.

[22] We recognize that the two systems may not be available on the same aircraft. Airlines will have the incentive, however, to seek lower prices and higher quality service for their customers in choosing what system to use or continue to use. *See* paragraph 35 *infra*.

[23] *See Report and Order*, GEN Docket Nos. 84-1231, 84-1233, and 84-1234, *supra*; *Report and Order*, CC Docket No. 86-495, *supra*. While an additional competitor in the cellular market, as proposed by Federal Digital, might produce important public benefits by increasing competition and introducing new technology, we find that the unmet demands of aircraft passengers must take precedence over the need of the users of cellular service for additional competition and new technology. Digital radio technology, moreover, already is planned for U.S. introduction soon. Even assuming the action Federal Digital urges might yield some marginal acceleration in that process--which is far from clear--that marginal gain must be weighed against the near-complete loss air passengers would experience. We do not, in short, find the public interest balance Federal Digital recommends to be, in our judgment, compelling.

[24] *See Memorandum Opinion and Order*, GEN. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd at 6831.

[25] On March 29, 1988, Mr. D.I. Court of the United Kingdom's Department of Trade and Industry wrote the FCC Chairman expressing concern about the proposed allocation of the 849-851/894-896 MHz bands for an air-ground service. Mr. Court said that these bands could not be used internationally for an air-ground service and stated that "the travelling public would best be served by a system which is planned on a global basis." In response to this letter Mr. Will McGibbon of the Commission's Office of Engineering and Technology wrote Mr. Court on May 6, 1988, stating that the 800 MHz spectrum is intended to serve United States domestic needs and that the 1593-1594/1625.5-1626.5 MHz bands appear to "be insufficient spectrum even for our domestic needs, let alone international use. Moreover, this is only a secondary allocation in Regions 2 and 3, which could prove unacceptable to ensure a viable service."

[26] However, we also note that the National Telecommunications and Information Administration, which is responsible for the management of the Federal Government's own use of the radio spectrum, has indicated willingness to work with the Commission to identify a block (or blocks) of frequencies now used by the Federal Government which could be made available for air-ground service in the future. If appropriate Government spectrum can be promptly identified and released to non-Government use, the Commission is prepared to consider a plan to migrate air-ground service users to that new spectrum. This non-Government spectrum in the 800 MHz band, which such a shift would then make available, would in turn, be assigned by the Commission in full accordance with any relevant legislation.

[27] This projection is based upon the following assumptions for a mature air-ground system in 1993:

1) Average number of calls per 100 passengers = 15, 17, or 20.

2) Average call length = 2.6 minutes.

3) Peak passenger load per flight = 142.

4) Number of ground stations = 59.

5) Poisson Grade-of-Service Objective = P.01 for each segment of the network, P.02 overall.

6) Channelization = 6 kHz. This channel plan produces 310 duplex communications channels and ten duplex 14 kHz pilot channels in a four megahertz allocation. Each pilot channel has 31 associated communications channels comprising a 200 kHz sub-group.

7) Frequency reuse plan: N = 4.

According to GTE, these assumptions result in only minimal degradation of service, since just four of the 59 ground stations would exceed P.01 for a 15 percent usage rate, seven of the stations would exceed P.01 for a 17 percent usage rate, and 13 of the stations would exceed P.01 for a 20 percent usage rate. By contrast, GTE's models show that if two suppliers split the 70 percent of the non-satellite market evenly under the above assumptions, with each using 59 ground stations, 19 of the 118 ground stations would exceed P.01 for a 15 percent usage rate, 31 of the stations would exceed P.01 for a 17 percent usage rate, and 42 of the stations would exceed P.01 for a 20 percent usage rate. To the extent that the market is not split evenly, according to GTE's models, congestion would worsen.

[28] As discussed in footnote 20, *supra*, the Airfone service, until recently, had been priced at a rate of $7.50 for the first three minutes and $1.25 per minute thereafter for a domestic call. Currently, the service is being offered at a rate of $2.00 per minute plus a $2.00 setup fee for a domestic call and a rate of $4.00 per minute plus a $4.00 setup fee for an international call. During the early portion of 1990, the service was being offered on weekends at a discount rate of $1.00 per minute plus a $1.00 setup fee for a domestic call.

[29] The Commission currently has a proposal outstanding that addresses the issue of whether use of cellular portable units should be prohibited aboard aircraft. *See Notice of Proposed Rule Making*, CC Docket No. 88-411, 3 FCC Rcd 5265 (1988). In a letter of November 27, 1989, to the Chief of the Commission's Common Carrier Bureau addressing this proposal, Mr. Arnold Aquilano, Associate Administrator for Airway Facilities of the FAA, stated his support for such a prohibition. The FAA has further indicated its readiness to amend its own flight safety regulations to prohibit use of cellular equipment on aircraft. On January 18, 1990, American Sky Cell Corporation (Sky Cell) submitted comments in CC Docket No. 88-411 in response to the FAA letter. In these comments, Sky Cell contends that "the FAA letter advocates an unreasonable and extreme position which is unsupported by substantial evidence." (*See* comments at para. 4). On February 5, 1990, Sky Cell also submitted an *ex parte* filing in the instant proceeding requesting that the Commission provide for further notice and comment on the FAA letter in this proceeding. Goeken and GTE responded to this filing on February 20, 1990, and February 21, 1990, respectively, stating that Sky Cell's concerns about the FAA letter should not be addressed in this proceeding.

The Commission finds that the issue of cellular portable use aboard aircraft can best be addressed in CC Docket No. 88-411. There is no need to duplicate in this proceeding matters already being considered in another proceeding. Therefore, Sky Cell's request for an additional comment period on this issue is denied.

[30] *Notice*, at para. 14.

[31] In their initial comments, Com/Nav and Global argued for private carriage regulation of the service, but changed their opinions in their reply comments. Both state that after reading the comments, they support common carrier regulation if the service is offered on a competitive basis.

[32] *See National Association of Regulatory Utilities Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) [*NARUC I*]; and *National Association of Regulatory Utilities Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) [*NARUC II*].

[33] *See NARUC I*, *supra* at 641.

[34] *See NARUC II*, *supra* at 609.

[35] *See Report and Order*, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

[36] In the *Notice*, we stated that if the service were classified as common carriage, we believed that state authority over rates, conditions of entry and exit, and technical and operational standards for the air-ground interconnected service should be preempted. *See Notice*, at para. 19.

[37] For such a showing to be acceptable, an applicant would have to demonstrate that the service will not be offered indiscriminately. Evidence of such an offering could be an intent by a carrier to enter into long-term contractual agreements with specific groups of airline passengers rather than making service available indiscriminately to all airline passengers.

[38] *See Report and Order*, CC Docket No. 79-252, 85 FCC 2d 1, 10 (1980).

[39] *See generally, Fifth Report and Order*, CC Docket No. 79-252, 98 FCC 2d 1191, 1192 (1984). "Streamlined" regulation requires that a carrier file tariffs with the Commission for interstate services, however, the carrier is subject to different tariff review rules than are carriers subject to full tariff review procedures. Streamlined tariffs may be filed on 14 days notice, 47 CFR Section 61.58(b) and are presumed lawful, 47 CFR Section 1.773(a)(ii). A petition seeking suspension and investigation or rejection of a streamlined carrier's tariff revision bears the burden of demonstrating (a) that there is a high probability that the tariff would be found unlawful after investigation, (b) that the harm alleged to competition would be more substantial than the injury to the public if the service were not available, (c) that irreparable injury will result if the tariff filing is not suspended, and (d) that the suspension would not otherwise be contrary to the public interest. Streamlined carriers need not provide cost justification material pursuant to 47 CFR Section 61.38. A streamlined carrier's tariff terms and conditions are subject to the Title II regulations of all common carriers, and any practice may be challenged at the Commission through the complaint process. 47 U.S.C. Section 208.

[40] We note that no commenters oppose such preemption.

[41] *Notice*, at para. 12.

[42] After the initial comment and reply comment period had ended, GTE released an internal study that found that a two megahertz supplier could achieve positive net income and cash flow in 1992. GTE placed this study in the docket file on July 26, 1989. *See* Comparative Hearing Implementation Planning Team Report, prepared by GTE Airfone, Inc., February 14, 1989.

[43] This study was performed by Bruce B. Lusignan, Ph.D, President of TransTech International.

[44] This study was performed by Keith B. Leffler, Ph.D., Associate Professor of Economics at the University of Washington.

[45] Goeken assumes that GTE Airfone would continue to provide service and, therefore, certain aspects of the plan are intended to permit GTE Airfone's continued operation. For

instance, the plan allows GTE Airfone to use the third pilot channel as it falls on the center frequency of its present pilot channel. Further, the new pilot channel plan would not be implemented for twelve months so that GTE Airfone would have a reasonable amount of time to modify its equipment. During that time, any new air-ground licensee that is prepared to commence service would be able to use a communications channel as its pilot channel.

[46] On March 30, 1990, Sky Cell submitted a filing that states that frequency reuse tests conducted in February 1990 by its consultant, Booz Allen & Hamilton, demonstrate that far more efficient use can be made of the spectrum than is possible under the existing Airfone system or Goeken plan. This filing is discussed in paragraph 67. As discussed in footnote 12, *supra*, we will treat Sky Cell's filing as a written *ex parte* presentation under Section 1.1206(a)(1) of the Commission's rules. 47 CFR Section 1.1206(a)(1).

[47] Furthermore, Sky Cell asserts, a similar approach has already been rejected by the Commission in the original cellular allocation, wherein Millicom, Inc.'s proposal to authorize use of the entire cellular frequency allocation for compatible systems, allowing for multiple system operators and open entry, was not adopted. *See Cellular Communications Systems*, 88 FCC 2d 469, 475-478 (1981).

[48] While a sharing approach was rejected for the cellular service, we believe the circumstances are significantly different with the air-ground service. Most importantly, there was 40 megahertz of spectrum available in the early 1980s--a sufficient amount for two cellular systems to be viable. We are concerned that two megahertz each for two air-ground systems may restrict the ability of the licensees to provide sufficient service to handle demand, particularly in nationwide systems where each licensee will have varying demands in different parts of the United States depending upon its customers. Further, co-location was a more serious problem with respect to the cellular service, where facilities would not naturally be placed in one area any more than another and some licensees may want to serve particular areas and others may not. As discussed in paragraph 71, *infra*, co-location more naturally occurs in the air-ground service near airports because they are the center of air traffic.

[49] Nevertheless, as discussed in paragraphs 74-84 *infra*, we are establishing qualifying criteria in order to ensure that an applicant's decision to attempt to provide this service has some basis in reason. While we believe that an open entry approach will best serve the public, we need to make sure that spectrum is not allocated inefficiently by assigning it to unqualified applicants. Also, based on the comments, we do not believe that the number of entrants will be so large as to preclude--either economically or technically--competitive service to the public. Of course, were such a problem to develop, we could revisit the approach, if necessary.

[50] We note that even with two separate systems, there is no guarantee that new technologies would necessarily be implemented. In order to stay competitively priced with competing service providers, licensees might forego technological advances that require substantial expenditures and, thus, rate increases.

[51] *See* 47 U.S.C. Section 303(g).

[52] *See e.g.*, paragraphs 91 and 92, *infra*.

[53] As noted in paragraphs 91 and 92 *infra*, the Commission intends to encourage the introduction of new technologies in this service by permitting the air-ground licensees to use any excess capacity created as a result of those technologies to provide ancillary services. We believe that this will provide a very strong economic incentive for the air-ground licensees to use these four megahertz in an efficient manner.

[54] We are leaving to the airlines the decision of whether to make available more than one air-ground system on an aircraft. If airborne equipment capable of accessing each air-ground system were to be employed, as discussed in paragraph 47, *supra*, an airline passenger could easily choose which system to use. However, as discussed in paragraph 101, *infra*, it is unclear whether such equipment will be manufactured.

[55] *Notice*, at para. 25.

[56] *Notice*, at para. 27.

[57] *Notice*, at para. 28.

[58] *Notice*, at para. 29.

[59] We recognize that this support for qualifying criteria was given in the context of support for the use of comparative hearings as a selection method. However, as discussed in paragraph 79 *infra*, qualifying criteria can be as beneficial in limiting the number of applicants in an open entry environment as when applicants will be considered comparatively.

[60] Com/Nav further states that the Commission should set a date certain for the termination of GTE Airfone's experimental authorization. Com/Nav contends that GTE has continued its market study far beyond what is necessary to establish the viability of air-ground service. However, since this proceeding addresses only the allocation of spectrum for the air-ground service and the promulgation of rules governing that service, Com/Nav's concerns about the experimental authorization are beyond the scope of this proceeding.

[61] Given the open-entry approach that we are adopting in this *Order*, Section 22.31 (Mutually exclusive applications) and Section 22.29 (Ownership changes and agreements to amend or dismiss applications or pleadings) of our Rules are not applicable to applications seeking to provide 800 MHz air-ground service.

[62] Applicants are reminded that financial qualifications are important and must be complied with. In a recent decision involving cellular radio, the United States Court of Appeals for the D.C. Circuit reversed a Commission decision to waive a rule requiring licensees to establish financial qualifications. The Court of Appeals found that the Commission had failed to establish any legitimate basis for a waiver, stating that "[b]igness and national reputation are not reasonable standards for a waiver policy." *See Northeast Cellular Telephone Co., L. P. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990).

[63] As the current GTE Airfone system consists of about 80 base stations, a 50 base stations per system requirement does not appear unreasonable.

[64] Once an application is filed for an air-ground system, the pre-construction provisions of Section 22.43(d) of the Rules would apply provided the applicant complied with the conditions of Section 22.43(d)(3).

[65] Licensees may construct and operate additional ground stations, less than one mile from the stations listed in Section 22.1109 or any station authorized at a later date, without obtaining prior approval in accordance with the requirements of Section 22.117(b). In addition, licensees adding ground stations in accordance with Section 22.117(b) must obtain antenna marking and lighting specifications from the Commission's Antenna Survey Branch before commencing construction. Moreover, a copy of Form 489 must be served on other authorized air-ground carriers at the time the Form is filed with the Commission. Stations more than 550 miles from a station listed in Section 22.1109 or a later authorized station must file on Form 401.

[66] By airline organization, we mean aircraft used by businesses, such as private corporate jets. Any applicant proposing to serve only airline organizations must indicate how many aircraft will be served and demonstrate their need for nationwide service. We will look closely at any application that proposes to serve only a relatively small number of aircraft, generally less than 50, or to serve one or more corporations that require service only in a limited region of the country.

[67] *See* paragraph 105, *infra*. We believe having an initial filing window of limited duration will encourage rapid development of air-ground service by multiple service providers by maximizing the degree of technical coordination at the outset. As noted in paragraph 105, we may permit additional applications if it appears the spectrum will be underutilized and additional entities express a desire to provide air-ground service.

[68] *Notice*, at para. 23.

[69] *See Report and Order*, GEN Docket No. 87-390, 3 FCC Rcd 7033 (1988), *recon. granted in part, Memorandum Opinion and Order*, GEN Docket No. 87-390, 5 FCC Rcd 1138 (1990).

[70] *Notice*, at para. 21.

[71] The terms pilot channel and control channel have the same meaning. Pilot channel P3 will be reserved for GTE Airfone, if it is ultimately granted a license, since it falls on the center frequency of its present pilot channel. Assuming GTE Airfone is granted a license, it will be accorded one year from publication of a summary of this item in the Federal Register or when it is granted a license, whichever is later, to modify its equipment to operate on this channel. The Commission will select and assign exclusively one control channel to each air-ground licensee after receiving notification that the licensee's system will begin providing service within one month. The Commission may initially assign a communications channel to be used for control purposes rather than a control channel.

[72] If more than four air-ground systems were authorized and constructed, it would be necessary to convert one or more of the thirty-one communications channels to pilot channel use. Since the communications channels are almost twice as wide as the pilot channels (6 kHz versus 3.2 kHz) and there is a 1.2 kHz guardband between the pilot and communications channels, it appears that the first three communications channels plus guardband could serve as many as six additional air-ground providers.

[73] In the event two or more proposed new locations propose to use the same channel block at locations farther apart than one mile but within 550 miles the applicants shall negotiate a technical solution (move one of the sites or change a channel block or any other technical proposal) before the applications can be granted.

GROUND TO AIR FREQUENCIES (MHz)

CHANNEL NUMBER	CHANNEL BLOCK 10	9	8	7	6
P-1	849.0020	849.2020	849.4020	849.6020	849.8020
P-2	849.0052	849.2052	849.4052	849.6052	849.8052
P-3	849.0084	849.2084	849.4084	849.6084	849.8084
P-4	849.0116	849.2116	849.4116	849.6116	849.8116
GB	849.0148	849.2148	849.4148	849.6148	849.8148
C-1	849.016	849.216	849.416	849.616	849.816
C-2	849.022	849.222	849.422	849.622	849.822
C-3	849.028	849.228	849.428	849.628	849.828
C-4	849.034	849.234	849.434	849.634	849.834
C-5	849.040	849.240	849.440	849.640	849.840
C-6	849.046	849.246	849.446	849.646	849.846
C-7	849.052	849.252	849.452	849.652	849.852
C-8	849.058	849.258	849.458	849.658	849.858
C-9	849.064	849.264	849.464	849.664	849.864
C-10	849.070	849.270	849.470	849.670	849.870
C-11	849.076	849.276	849.476	849.676	849.876
C-12	849.082	849.282	849.482	849.682	849.882
C-13	849.088	849.288	849.488	849.688	849.888
C-14	849.094	849.294	849.494	849.694	849.894
C-15	849.100	849.300	849.500	849.700	849.900
C-16	849.106	849.306	849.506	849.706	849.906
C-17	849.112	849.312	849.512	849.712	849.912
C-18	849.118	849.318	849.518	849.718	849.918
C-19	849.124	849.324	849.524	849.724	849.924
C-20	849.130	849.330	849.530	849.730	849.930
C-21	849.136	849.336	849.536	849.736	849.936
C-22	849.142	849.342	849.542	849.742	849.942
C-23	849.148	849.348	849.548	849.748	849.948
C-24	849.154	849.354	849.554	849.754	849.954
C-25	849.160	849.360	849.560	849.760	849.960
C-26	849.166	849.366	849.566	849.766	849.966
C-27	849.172	849.372	849.572	849.772	849.972
C-28	849.178	849.378	849.578	849.778	849.978
C-29	849.184	849.384	849.584	849.784	849.984
C-30	849.190	849.390	849.590	849.790	849.990
C-31	849.196	849.396	849.596	849.796	849.996

GROUND TO AIR FREQUENCIES (MHz)
(continued)

CHANNEL NUMBER	CHANNEL BLOCK 5	4	3	2	1
P-1	850.0020	850.2020	850.4020	850.6020	850.8020
P-2	850.0052	850.2052	850.4052	850.6052	850.8052
P-3	850.0084	850.2084	850.4084	850.6084	850.8084
P-4	850.0116	850.2116	850.4116	850.6116	850.8116
GB	850.0148	850.2148	850.4148	850.6148	850.8148
C-1	850.016	850.216	850.416	850.616	850.816
C-2	850.022	850.222	850.422	850.622	850.822
C-3	850.028	850.228	850.428	850.628	850.828
C-4	850.034	850.234	850.434	850.634	850.834
C-5	850.040	850.240	850.440	850.640	850.840
C-6	850.046	850.246	850.446	850.646	850.846
C-7	850.052	850.252	850.452	850.652	850.852
C-8	850.058	850.258	850.458	850.658	850.858
C-9	850.064	850.264	850.464	850.664	850.864
C-10	850.070	850.270	850.470	850.670	850.870
C-11	850.076	850.276	850.476	850.676	850.876
C-12	850.082	850.282	850.482	850.682	850.882
C-13	850.088	850.288	850.488	850.688	850.888
C-14	850.094	850.294	850.494	850.694	850.894
C-15	850.100	850.300	850.500	850.700	850.900
C-16	850.106	850.306	850.506	850.706	850.906
C-17	850.112	850.312	850.512	850.712	850.912
C-18	850.118	850.318	850.518	850.718	850.918
C-19	850.124	850.324	850.524	850.724	850.924
C-20	850.130	850.330	850.530	850.730	850.930
C-21	850.136	850.336	850.536	850.736	850.936
C-22	850.142	850.342	850.542	850.742	850.942
C-23	850.148	850.348	850.548	850.748	850.948
C-24	850.154	850.354	850.554	850.754	850.954
C-25	850.160	850.360	850.560	850.760	850.960
C-26	850.166	850.366	850.566	850.766	850.966
C-27	850.172	850.372	850.572	850.772	850.972
C-28	850.178	850.378	850.578	850.778	850.978
C-29	850.184	850.384	850.584	850.784	850.984
C-30	850.190	850.390	850.590	850.790	850.990
C-31	850.196	850.396	850.596	850.796	850.996

AIR TO GROUND FREQUENCIES (MHz)

CHANNEL NUMBER	CHANNEL BLOCK 10	9	8	7	6
P-1	894.0020	894.2020	894.4020	894.6020	894.8020
P-2	894.0052	894.2052	894.4052	894.6052	894.8052
P-3	894.0084	894.2084	894.4084	894.6084	894.8084
P-4	894.0116	894.2116	894.4116	894.6116	894.8116
GB	894.0148	894.2148	894.4148	894.6148	894.8148
C-1	894.016	894.216	894.416	894.616	894.816
C-2	894.022	894.222	894.422	894.622	894.822
C-3	894.028	894.228	894.428	894.628	894.828
C-4	894.034	894.234	894.434	894.634	894.834
C-5	894.040	894.240	894.440	894.640	894.840
C-6	894.046	894.246	894.446	894.646	894.846
C-7	894.052	894.252	894.452	894.652	894.852
C-8	894.058	894.258	894.458	894.658	894.858
C-9	894.064	894.264	894.464	894.664	894.864
C-10	894.070	894.270	894.470	894.670	894.870
C-11	894.076	894.276	894.476	894.676	894.876
C-12	894.082	894.282	894.482	894.682	894.882
C-13	894.088	894.288	894.488	894.688	894.888
C-14	894.094	894.294	894.494	894.694	894.894
C-15	894.100	894.300	894.500	894.700	894.900
C-16	894.106	894.306	894.506	894.706	894.906
C-17	894.112	894.312	894.512	894.712	894.912
C-18	894.118	894.318	894.518	894.718	894.918
C-19	894.124	894.324	894.524	894.724	894.924
C-20	894.130	894.330	894.530	894.730	894.930
C-21	894.136	894.336	894.536	894.736	894.936
C-22	894.142	894.342	894.542	894.742	894.942
C-23	894.148	894.348	894.548	894.748	894.948
C-24	894.154	894.354	894.554	894.754	894.954
C-25	894.160	894.360	894.560	894.760	894.960
C-26	894.166	894.366	894.566	894.766	894.966
C-27	894.172	894.372	894.572	894.772	894.972
C-28	894.178	894.378	894.578	894.778	894.978
C-29	894.184	894.384	894.584	894.784	894.984
C-30	894.190	894.390	894.590	894.790	894.990
C-31	894.196	894.396	894.596	894.796	894.996

AIR TO GROUND FREQUENCIES (MHz)
(continued)

CHANNEL NUMBER	CHANNEL BLOCK 5	4	3	2	1
P-1	895.0020	895.2020	895.4020	895.6020	895.8020
P-2	895.0052	895.2052	895.4052	895.6052	895.8052
P-3	895.0084	895.2084	895.4084	895.6084	895.8084
P-4	895.0116	895.2116	895.4116	895.6116	895.8116
GB	895.0148	895.2148	895.4148	895.6148	895.8148
C-1	895.016	895.216	895.416	895.616	895.816
C-2	895.022	895.222	895.422	895.622	895.822
C-3	895.028	895.228	895.428	895.628	895.828
C-4	895.034	895.234	895.434	895.634	895.834
C-5	895.040	895.240	895.440	895.640	895.840
C-6	895.046	895.246	895.446	895.646	895.846
C-7	895.052	895.252	895.452	895.652	895.852
C-8	895.058	895.258	895.458	895.658	895.858
C-9	895.064	895.264	895.464	895.664	895.864
C-10	895.070	895.270	895.470	895.670	895.870
C-11	895.076	895.276	895.476	895.676	895.876
C-12	895.082	895.282	895.482	895.682	895.882
C-13	895.088	895.288	895.488	895.688	895.888
C-14	895.094	895.294	895.494	895.694	895.894
C-15	895.100	895.300	895.500	895.700	895.900
C-16	895.106	895.306	895.506	895.706	895.906
C-17	895.112	895.312	895.512	895.712	895.912
C-18	895.118	895.318	895.518	895.718	895.918
C-19	895.124	895.324	895.524	895.724	895.924
C-20	895.130	895.330	895.530	895.730	895.930
C-21	895.136	895.336	895.536	895.736	895.936
C-22	895.142	895.342	895.542	895.742	895.942
C-23	895.148	895.348	895.548	895.748	895.948
C-24	895.154	895.354	895.554	895.754	895.954
C-25	895.160	895.360	895.560	895.760	895.960
C-26	895.166	895.366	895.566	895.766	895.966
C-27	895.172	895.372	895.572	895.772	895.972
C-28	895.178	895.378	895.578	895.778	895.978
C-29	895.184	895.384	895.584	895.784	895.984
C-30	895.190	895.390	895.590	895.790	895.990
C-31	895.196	895.396	895.596	895.796	895.996

Section 22.1109 Initial geographical channel block layout.

Except as provided in paragraph (b) of this Section, ground station locations must be within one mile of the locations listed in this paragraph. The indicated channel block for each location must be used to provide service to airborne mobile stations in flight.

Location	N. Latitude	W. Longitude	Channel Block
ALASKA			
Anchorage	61°11'06"	149°54'42"	8
ARIZONA			
Phoenix	33 33 39	112 05 12	4
Winslow	35 01 30	110 43 20	6
CALIFORNIA			
Blythe	33 37 15	114 43 08	10
Los Angeles	33 55 50	118 22 30	4
Oakland	37 51 12	122 22 35	1
S. San Francisco	37 41 16	122 26 09	6
Visalia	36 19 01	119 23 05	7
COLORADO			
Colorado Springs	38 44 39	104 51 46	8
Denver	39 46 45	104 50 49	1
Hayden	40 28 54	107 13 07	6
FLORIDA			
Miami	25 48 30	80 16 10	4
Orlando	28 26 58	81 21 51	2
Tallahassee	30 24 04	84 21 34	7
GEORGIA			
Atlanta	33 39 30	84 25 22	8
HAWAII			
Mauna Kapu	21 24 24	158 06 02	5

IDAHO			
Blackfoot	43 11 32	112 40 21	8
ILLINOIS			
Chicago	41 47 12	87 45 06	3
Kewanee	41 12 24	89 57 36	5
Schiller Park	41 57 18	87 52 57	2
INDIANA			
Fort Wayne	40 58 59	85 11 48	7
IOWA			
Des Moines	41 32 18	93 38 18	1
KANSAS			
Garden City	37 59 35	100 54 04	3
Wichita	37 37 06	97 27 01	7
KENTUCKY			
Fairdale	38 04 48	85 47 33	6
LOUISIANA			
Kenner	29 59 38	90 15 22	3
Shreveport	32 27 22	93 49 20	5
MASSACHUSETTS			
Boston	42 23 15	71 01 03	7
MICHIGAN			
Flint	42 57 56	83 44 37	9
Sault Ste. Marie	46 28 47	84 22 05	6
MINNESOTA			
Bloomington	44 51 33	93 13 10	9

MISSISSIPPI			
Meridian	32 19 10	88 41 33	9
MISSOURI			
Kansas City	39 17 57	94 43 04	6
St. Louis	38 44 52	90 21 44	4
Springfield	37 14 50	93 22 40	9
MONTANA			
Lewistown	47 02 56	109 27 27	5
Miles City	46 26 07	105 53 02	8
Missoula	47 01 05	114 00 41	3
NEBRASKA			
Grand Island	40 57 10	98 18 30	2
Ogallala	41 07 06	101 45 57	4
NEVADA			
Las Vegas	36 05 28	115 10 19	1
Reno	39 35 13	119 55 52	3
Tonopah	38 04 06	117 12 30	9
Winnemucca	41 00 38	117 45 40	4
NEW MEXICO			
Alamogordo	32 54 46	105 56 42	8
Albuquerque	35 03 05	106 37 13	10
Clayton	36 27 29	103 11 16	5
NEW YORK			
E. Elmhurst	40 46 38	73 52 20	1
Henrietta	43 05 39	77 36 40	3
Staten Island	40 36 05	74 06 35	9
NORTH CAROLINA			
Greensboro	36 05 09	79 56 07	9
Wilmington	34 15 52	77 53 45	7

NORTH DAKOTA			
Dickinson	46 51 06	102 47 19	7
OHIO			
Pataskala	40 04 38	82 41 57	1
OKLAHOMA			
Warner	35 29 31	95 18 25	4
Woodward	36 24 42	99 28 50	9
OREGON			
Klamath Falls	42 06 30	121 38 00	2
Pendleton	45 35 45	118 31 02	7
PENNSYLVANIA			
Coraopolis	40 30 18	80 13 25	4
New Cumberland	40 11 30	76 52 02	8
SOUTH CAROLINA			
Charleston	32 54 15	80 01 08	4
SOUTH DAKOTA			
Aberdeen	45 27 21	98 25 26	6
Rapid City	44 02 06	103 03 04	5
TENNESSEE			
Elizabethton	36 26 04	82 08 06	7
Memphis	35 01 44	89 56 15	10
Nashville	36 09 08	86 41 21	3
TEXAS			
Austin	30 16 37	97 49 34	2
Bedford	32 50 23	97 08 02	1
Houston	29 54 37	95 24 39	9
Lubbock	33 37 06	101 52 14	7
Monahans	31 34 55	102 54 05	6

UTAH			
Abajo Peak	37 50 21	109 27 42	7
Delta	39 22 40	112 31 05	2
Escalante	37 45 19	111 52 27	5
Green River	38 57 53	110 14 04	3
VIRGINIA			
Arlington	38 52 57	77 06 17	6
WASHINGTON			
Seattle	47 26 08	122 17 35	4
WEST VIRGINIA			
Charleston	38 19 47	81 30 25	2
WISCONSIN			
Stevens Point	44 33 06	89 25 27	8
WYOMING			
Riverton	43 03 37	108 27 23	9

(a) Any of the ten channel blocks may be used to provide service to airborne mobile stations on the ground, provided that the vertical antenna pattern (of the antenna used for ground station transmissions on channel blocks other than the one specified in this Section for the particular location involved) shows the following attenuation in all azimuths: 47 decibels above 1° elevation and 67 decibels above 2° elevation.

(b) A ground station location may be more than one mile from all of the locations listed in this Section provided that it is at least 550 miles from all existing locations using the same channel block for communication with 800 MHz airborne mobile stations in flight.

Section 22.1111 Emission limitations.

Any appropriate emission type may be used to provide air-ground radiotelephone service provided that the emission limitations of this Section are met.

(a) The power of any emission on any frequency removed from the center of the authorized bandwidth by more than 3 kHz must be at least 30 decibels below the peak envelope power of the emission.

(b) The power of any emission on any frequency removed from the center of the authorized bandwidth by more than 9 kHz must be at least 60 decibels below the peak envelope power of the emission.

(c) If an emission on any frequency outside of the authorized bandwidth causes harmful interference, the Commission may require greater attenuation of that emission than required in paragraphs (b) and (c) of this Section.

(d) The provisions of Section 22.106 of this Part do not apply to 800 MHz air-ground systems.

Section 22.1113 Transmitter frequency tolerance.

Ground station transmitter frequencies must be maintained within $\pm$0.1 parts per million (ppm) of the channel reference or center frequencies. Doppler shift correction shall be used to ensure that the frequencies of the signals of airborne mobile stations received at ground stations remain within $\pm$0.2 ppm of the channel reference or center frequencies.

Section 22.1115 Dynamic channel allocation procedures.

Operation of stations in this service must be in accordance with the procedures in this Section.

(a) A communications channel is not available for use by a ground station if the received signal power on that channel at the ground station exceeds -115 dBm, which, assuming a 0 dB gain 895 MHz receive antenna, corresponds to a field strength of approximately 19 dBu V/m.

(b) Data indicating which communications channels are available for use are transmitted by ground stations on the assigned control channels.

(c) A call is originated when an airborne mobile station selects a communications channel based on the received data from ground stations and other factors, and transmits an identification code (which identifies the specific ground station from which service is requested) on the selected communications channel. The ground station from which service has been requested may then obtain any necessary billing information and complete the call.

(d) A ground station may not transmit on a communications channel unless it has received the proper identification code. Ground stations other than the one from which service has been requested must consider the

communications channel to be unavailable until either a hang-up signal is transmitted by the airborne mobile station, or the received signal power on that channel drops below -115 dBm for a period of at least 15 seconds. The hang-up signal is the on-off keying (50% duty cycle) of an unmodulated carrier over a period of one second with pulse duration of 5 milliseconds. However, if all licensees agree that an alternative hang-up signal would be more efficient or beneficial, such alternative hang-up signal may be used.

Section 22.1117 Limitations on effective radiated power.

The effective radiated power (ERP) of airborne mobile station transmitters shall not exceed 30 Watts. The ERP of ground station transmitters in communication with airborne mobile stations in flight must not exceed 100 Watts. The ERP of ground station transmitters in communication with airborne mobile stations on the ground must not exceed 5 Watts.

Section 22.1119 Assignment of control channels.

The Commission will select and assign exclusively one control channel to each air-ground licensee after receiving written notification that the licensee's system will begin providing service within one month. The Commission may initially assign a communications channel rather than a control channel to be used for control purposes.

APPENDIX B

Parties Filing Comments

Alaska Airlines
American Airlines
American SMR Network Association, Inc.
America West Airlines
Bell Atlantic Mobile Systems, Inc.
BellSouth Corporation
Cellular Telecommunications Industry Association
Com/Nav Marine, Inc.
Continental Airlines
Delta Air Lines, Inc.
Eastern Airlines
Geostar Messaging Corporation
Global-Wulfsberg Systems
Goeken Group Corporation
GTE Corporation/GTE Airfone Incorporated
International Mobile Machines Corporation
Land Mobile Communications Council
McCaw Cellular Communications, Inc.
Metro Mobile CTS, Inc.
MGM Grand Air
National Association of Business and Educational Radio, Inc.
National Association of Regulatory Utility Commissioners
National Business Aircraft Association, Inc.
Charles McC. Mathias, Jr. National Study Center for Trauma and Emergency Medical Systems
Northwest Airlines, Inc.
Pan Am Shuttle, Inc.
Puerto Rico Telephone Company
Suite 12 Group
Telocator Network of America
Trans World Airlines, Inc.
United Airlines
United States Telephone Association
Utilities Telecommunications Council

Parties Filing Reply Comments

Alltel Mobile Communications, Inc.
American Airlines
American Skycell
American Sky Cell Corporation*
America West Airlines
Bell Atlantic Mobile Systems, Inc.
BellSouth Corporation
Cellular Telecommunications Industry Association
Com/Nav Marine, Inc.
Continental Airlines
Global-Wulfsberg Systems
Graphic Scanning Corp.
GTE Corporation/GTE Airfone Incorporated
International Airline Passengers Association
International Mobile Machines Corporation
Land Mobile Communications Council
McCaw Cellular Communications, Inc.
Metro Mobile CTS, Inc.
Midway Airlines
Mobile Telecommunications Technologies Corporation**
Motorola, Inc.
National Association of Business and Educational Radio, Inc.
National Association of Regulatory Utility Commissioners
National Telephone Cooperative Association
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Bell and Nevada Bell
Pan American World Airways, Inc.
People of the State of California and the Public Utilities Commission of the State of California
Puerto Rico Telephone Company
Telocator
The Trump Shuttle
United States Telephone Association

*American Sky Cell Corporation is the successor corporation to American Skycell.

**Mobile Telecommunications Technologies Corporation (Mtel) is the successor corporation to Mobile Communications Corporation of America (MCCA). Mtel's interests in the proceeding were previously represented by Com/Nav Marine, Inc., an MCCA subsidiary.

April 12, 1990

Dissenting Statement
of
Commissioner Sherrie P. Marshall

Re: Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands.

I dissent from this decision for two reasons: first, this allocation will not result in the most effective use of spectrum; and second, this proposed licensing plan may impede, rather than encourage, technological advances.

I am not persuaded that a permanent allocation of spectrum for terrestrial air-to-ground communications systems best serves the public interest. The Commission has already assigned spectrum for satellite services that will include air-to-ground communications. Competition will exist in these services. Indeed, satellite capacity will be sufficient to meet the needs of several competing air-to-ground service providers. Thus, no additional spectrum is necessary for the public to have access to air-to-ground communications at competitive prices.

I recognize that satellite air-to-ground transmissions are not presently available to the public, but they soon will be. In the meantime, air-to-ground services could continue to be available through extension of GTE Airfone's experimental license. Extension of that license would also enable GTE to amortize its developmental costs and make sufficient profit to encourage GTE and others to experiment with new uses of spectrum.

I am also concerned that the licensing plan and technical constraints imposed in this Order may impede technological advances. The service authorized today uses soon to be outmoded analog technology. Digital technology, which is more spectrum efficient and provides better quality, should be available for this service by the time our air-to-ground licensing process is completed. However, this Order could well preclude implementation of digital upgrades unless all licensees agree on compatible technical standards. I am skeptical whether individual competitors, who may have invested in different digital technologies, will agree in a timely manner on those standards.

For these reasons, I would have preferred that the Commission merely extend GTE Airfone's experimental license for the three to four years until competitive satellite air-to-ground services are available to the American public.

# # # # #

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 22, 1990

Released: June 22, 1990

Mr. Paul Glist
Cole, Raywid & Braverman
Attorneys at Law
Second Floor
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Glist:

This is in response to your letter of December 20, 1989 which requested a response that would allow companies paying pole attachment rentals to determine pole attachment carrying costs using Part 32 accounts reported in the Annual Report Form M.

You requested that we review your understanding of where the contents of certain Part 31 accounts are reported on the Federal Communications Commission Annual Report Form M. Annual Report Form M was revised on April 27, 1989 (DA 89-503, released May 12, 1989) to reflect the new accounting system in Part 32 (47 C.F.R. Part 32) that replaced the accounting system in Part 31 effective January 1, 1988.

Your letter also requested information on whether or not the contents of several apparently comparable Part 32 expense accounts now include more expenses than they previously included under Part 31. The Part 32 accounts for which you requested more specific information are discussed in the following paragraphs.

Account 6411, Poles expense.

Account 6411 under Part 32 is comparable to Part 31 Account 602.1, Repair of pole lines, if the benefit component and rent component of the expense matrix are eliminated. Under Part 32, Account 6411 includes benefits previously included in Part 31 Account 672, Relief and pensions, social security and other payroll taxes previously recorded in Part 31 Account 307, Other operating taxes, and rents previously included in Part 31 Account 671, Operating rents. Account 602.1 generally matches with the sum of columns (ac) and (af) reported for Account 6411 on Annual Report Form M Schedule I-1.

In the formula prescribed in CC Docket 86-212, the benefit amounts reported in Annual Report Form M Schedule I-1 column (ad) would have been included as part of the numerator for the calculation of the administrative expense ratio and the social security and other payroll taxes also included in column (ad) would have been included in the numerator for the calculation of the normalized taxes ratio. The rents reported in column (ae) would have been included as part of the numerator for the calculation of the administrative expense ratio.

Account 6124, General purpose computers expense. Account 6724, Information management.

Your letter correctly notes that Part 31 did not provide separate accounts for computer expenses and that Part 32 includes expenses recorded in Account 6724 in the category of general and administrative expenses. Your letter is not correct in assuming that if one wishes to isolate the computing expenses a telephone utility incurs in general corporate overhead, one would look to Account 6724 only. Account 6124, as presently described in Part 32 does include some expenses that under Part 31 were included in general and administrative expenses. Expenses recorded in Account 6124 relate to assets recorded in Account 2124, General purpose computers, which by definition relate to general administrative information processing activities. (*See* 47 C.F.R. Sections 32.2124 and 32.5999 (b)). While we have conducted no formal analysis of this account it should not contain expenses associated with computers and related devices and software that perform switching, network signalling, network operations or plant specific equipment functions for which accounts have been provided (*See* 47 C.F.R. 32.2124 (d)).

Account 6535, Engineering expense.

Under Part 31, expenses of general engineering departments were recorded initially in Account 705, Engineering expense and then cleared to other accounts on the basis of services rendered, as determined by the time devoted to particular jobs. The pay and expenses of supervisory personnel and other personnel engaged in clerical, reproduction and record work were also cleared to other accounts. Under Part 32, Account 6535 includes general engineering expense that is not directly chargeable to specific undertakings or projects. Under Part 32, engineering expenses directly related to poles would be recorded in Account 6411, Poles expense. As a result, a portion of Account 6535 would include the indirect expenses of supervisory personnel that under Part 31 would have been cleared to Part 31 Account 602.1, Repair of pole lines.

Account 6611, Product management. Account 6612, Sales. Account 6613, Product advertising. Account 6621, Call completion services. Account 6622, Number services. Account 6623, Customer services.

Under Part 31, the expenses recorded in Accounts 640 through 650, considered in the aggregate, generally track to Accounts 6611 through 6623 under Part 32, with the exception of connecting company relations expenses, which were recorded in Part 31 Account 644 that are now recorded in Account 6722 under Part 32.

Account 6722, External relations.

Some of the expenses recorded in this account were not included in Accounts 661 through 677 under Part 31. These expenses include nonproduct related corporate image advertising and some expenses that were recorded in Account 644, Connecting company relations. The nonproduct related corporate image advertising portion of the expenses recorded in Account 6722 can be identified on Annual Report Form M Schedule I-6. There is no separate identification of the connecting company portion of expenses recorded in Account 6722 in the Annual Report Form M.

Account 6726, Procurement.

Under Part 31, the expenses now recorded in Account 6726 were originally recorded in Account 704, Supply expense and then cleared to appropriate accounts including Accounts 661 through 677.

We have reviewed the attachment to your letter, which we have revised in light of the previous discussion and enclosed as an attachment to this letter.

If you have additional questions you may contact John T. Curry or Thaddeus Machcinski of my staff on (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

Attachment

ATTACHMENT

Conversion Schedule

Part 31 Account	Part 32 Account Title	Form M Location
100.1	Telephone Plant in Service	2001/Sch. B-1
171	Accumulated Depreciation	3100/Sch. B-1
176.1	Net Current Def. Operating Inc. Taxes	4100/Sch. B-11
	Net Noncurrent Def. Oper. Inc. Taxes	4340/Sch. B-11
241	Pole Lines Investment	2411/Sch. B-1
608	Pole Lines Accumulated Depreciation	2411/Sch. B-5b
304	Operating Investment Tax Credits-net	7210/Sch. I-1
306	Operating Federal Income Taxes	7220/Sch. I-1
307	Operating State and Local Income Taxes	7230/Sch. I-1 1/
	Operating Other Taxes	7240/Sch. I-1 1/
308.1		
308.2		
309	Provision for Defer. Operating Inc. Tax-net	7250
602.1	Pole Expense	6411/Sch. I-1 2/
661	Executive and Planning	6710/Sch. I-1
662		
663	Accounting and Finance	6721/Sch. I-1
664	External Relations	6722/Sch. I-1 3/
	Legal	6725/Sch. I-1

1/ Does not include social security and other payroll taxes.

2/ Column (ad) will include relief and pensions formally recorded in Account 672 and social security and other payroll taxes included in Account 307. Column (ae) will include rents included in Account 671.

3/ Includes institutional advertising included in Account 642, and connecting company relations included in Account 644. The amount of advertising in 6722 is reported on Form M Schedule I-6.

Part 31 Account	Part 32 Account Title	Form M Location
665	Other General and Administrative	6728
668	Poles Expense (other matrix)	6411/Sch.I-1 col.(af)
669	Poles Expense (other matrix)	6411/Sch.I-1 col.(af)
670	Earth Station Expenses	6231/Sch.I-1 col.
671	Poles Expense (rent matrix)	6411/Sch.I-1 col.(ae)
672	Poles Expense (benefits matrix)	6411/Sch.I-1 col.(ad)
673	Telephone Franchise Requirements	Various Accounts
674	General Services and Licenses	Various Accounts
675	Other Expenses	Various Accounts
	General Purpose Computers	6124/Sch. I-1 4/
	Engineering Expense	6535/Sch. I-1 4/
	Human Resources	6723/Sch. I-1
	Information Management	6724/Sch. I-1 4/
	Procurement	6726/Sch. I-1 5/
	Research and Development	6727/Sch. I-1
	Other General and Administrative	6728/Sch. I-1 6/

4/ A portion of these expenses were included in total administrative and general expenses under Part 31.

5/ A portion of the expenses recorded in this account were recorded in Account 704. Supply expense under Part 31 and then cleared to appropriate Accounts 661 through 677.

6/ A portion of these expenses were included in Account 626 Rest and lunchrooms under Part 31.

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